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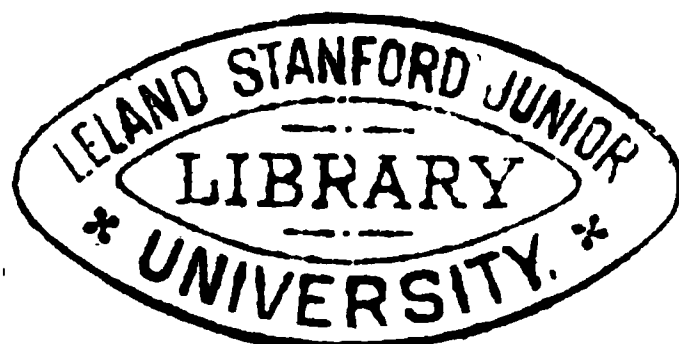
AMERICAN AND ENGLISH RAILROAD CASES

A COLLECTION OF ALL
CASES AFFECTING RAILROADS OF EVERY KIND DECIDED BY
THE COURTS OF APPELLATE JURISDICTION
IN THE
UNITED STATES, ENGLAND AND CANADA

EDITED BY
FRANK C. SMITH

VOLUME II
NEW SERIES

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GENERAL LIABILITY OF CARRIERS OF PASSENGERS FOR BAGGAGE.

By U. M. ROSE.*

Carriers of passengers are considered in law as common carriers in respect of their responsibility for the baggage—or luggage, as it is called in England—which is taken by the passenger on his journey. *Chitty on Carriers*, 15; *Browne on Carriers*, 62. That is to say, the carrier becomes an insurer of its safety against every accident which is not the act of God or of the public enemy, or the fault of the passenger himself. *Hutchinson on Carriers*, sec. 687. Or, to speak more definitely, the carrier is liable in case of loss or damage to the baggage unless such loss or damage come under one of the following heads: first, losses caused by the act of God; second, losses caused by the public enemy; third, losses caused by the inherent defect, quality, or vice of the thing carried; fourth, losses caused by the seizure of the baggage in the hands of the carrier under legal process; and, fifth, losses caused by some act or omission of the owner of it. *Lawson on Contracts of Carriers*, sec. 3.

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The liability of a carrier of baggage is the same as for freight. *Merrill v. Grinnell*, 30 N. Y. 615.

The price paid for a passenger's ticket includes the carriage of his baggage. *Cincinnati R. Co. v. Marcus*, 38 Ill. 219. *Hutchinson on Carriers*, sec. 678.

LIMITATION OF COMMON-LAW RESPONSIBILITY OF CARRIERS BY
CONTRACT AND BY NOTICE.

By special contract the carrier may relieve himself of all loss on account of baggage, unless at least the loss is caused by the negligence of the carrier or of his servants. *The Majestic*, 56 Fed. Rep. 247; *Navigation Co. v. Shand*, 3 Moore P. C. (N. S.) 272, 288; *Mich. Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318; *Ayres v. Western R. Corp.*, 14 Blatchf. (U. S.) 9; *New York R. Co. v. Fraloff*, 100 U. S. 24; *Wheeler*, *Modern Law of Carriers*, 263; *Morrison v. Phillips Construction Co.*, 44 Wis. 405; *Farnham v. Camden R. Co.*, 55 Pa. St. 58; *Malone v. Boston R. Co.*, 12 Gray (Mass.) 388; *Rumsey v. Northeastern R. Co.*, 14 C. B. N. S. 641; *Atwood v. Reliance Transp. Co.*, 9 Watts (Pa.) 87; *Bingham v. Rogers*, 6 W. & S. (Pa.) 495; *Moore v. Evans*, 14 Barb. (N. Y.) 524; *Laing v. Colder*, 8 Pa. St. 479; *Davidson v. Graham*, 2 Ohio St. 132; *Bissell v. New York R. Co.*, 25 N. Y. 442; Note to *Cole v. Goodwin*, 32 Am. Dec. 497, 19 Wend. (N. Y.) 251. Such a contract need not be in writing. *American Transportation Co. v. Moore*, 5 Mich. 368.

In England the power of a carrier to stipulate for exemption from liability for loss caused by the negligence, or even the wilful misconduct, of itself, or its servants, was formerly conceded. *Duff v. Great Northern R. Co.*, L. R., Ireland, 4 Com. Law. 178; *Henderson v. Stevenson*, L. R., 2 Scotch App. 70, 13 Moak's Rep. 141; *Alexander v. Toronto R. Co.*, 33 U. C. 474; *McCawley v. Furness R. Co.*, L. R. 8 Q. B. 57; *Hall v. Northeastern R. Co.*, L. R. 8 Q. B. 437.

For a review of the English cases, which are far from being harmonious, see *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *New York R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Suger v. Portsmouth S. & P. & E. R. Co.*, 31 Me. 228, 2 Am. & Eng. Enc. Law, p. 811, note 3. *Lanson Carr.* 455.

Baggage is within section 7 of the Railway and Canal Traffic Act, 1854, which enacts that a railway company shall be liable for the loss of or injury to any horse, cattle, or other animals, or to articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect of such company or its servants, notwithstanding any notice or condition made and given by such company to the contrary, or in any wise limiting such liability; but providing that nothing contained in the act shall be construed to prevent the company from making special contracts relative to the carriage of such articles. This statute by a separate act has been extended to traffic on steamers belonging to or used by railway companies authorized to have and use them. *Cohen v. Southeastern R. Co.*, 2 Exch. Div. 253, 20 Moak's Rep. 525, overruling *Doolan v. Midland R. Co.*, Irish Rep. 10 C. L. 47, 82, and *Stewart v. London R. Co.*, 3 H. & C. 135.

It applies to baggage of passengers. *Cohen v. Southeastern R. Co.*, *supra*.

But in the case of excursion tickets sold at reduced rates it was held that the carrier might restrict its responsibility for baggage by a notice, though not brought home to the passenger. *Stewart v. London R. Co.*, 3 H. & C., 135.

The act was passed to prevent the abuses which had grown up whereby carriers, by means of notices, evaded their common-law liability. *Peck v. North Staffordshire R. Co.*, 10 H. L. Cas. 494.

In *New York R. Co. v. Fraloff*, 100 U. S. 24, the court said: "It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character, and not inconsistent with any statute, or its duties to the public, to protect itself against liability as insurer for baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk." However, so far as this statement implies that the passenger is presumed to assent to any regulation actually brought to his notice, it is a mere *dictum*; and, as we shall see hereafter, the cases on this point are not harmonious.

Some of the courts of this country allow the carrier to

stipulate against liability for losses caused by his negligence of every degree short of wilful misconduct or fraud. *Magnin v. Dinsmore*, 56 N. Y. 168; *Wells v. New York R. Co.*, 26 Barb. (N. Y.) 641; s. c., 24 N. Y. 181; *Poucher v. New York R. Co.*, 49 N. Y. 263; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485; *Perkins v. New York R. Co.*, 24 N. Y. 208; *Bissell v. New York R. Co.*, 25 N. Y. 442; *Kinney v. Central R. Co.*, 32 N. J. L. 409; s. c., 34 N. J. L. 513; *Western R. Co. v. Bishop*, 50 Ga. 465; *Griswold v. New York & N. E. R. Co.*, 53 Conn. 372, 26 Am. & Eng. R. Cas. 280; *Lee v. Marsh*, 43 Barb. (N. Y.) 102; *Prentice v. Decker*, 49 Barb. (N. Y.) 21; *Boswell v. Hudson River R. Co.*, 5 Bosw. (N. Y.) 699.

In Pennsylvania it is held that a carrier cannot by contract exempt itself from responsibility for actual negligence. *American Express Co. v. Bank of Titusville*, 69 Pa. St. 394; *Goldey v. Pennsylvania R. Co.*, 30 Pa. St. 242; *Powell v. Pennsylvania R. Co.*, 32 Pa. St. 414; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335; *Empire Transp. Co. v. Wamsutta Min. Co.*, 63 Pa. St. 14; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 526.

In New York the carrier may make special contracts exempting him from liability for negligence of every degree and even for the wilful acts of his servants and agents, but not for those of the directors of a corporation engaged in business as a carrier. *Cragin v. New York Cent. R. Co.*, 57 N. Y. 61, 10 Am. Rep. 559; *Mynard v. Syracuse R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Bissell v. New York Cent. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364; *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364; *Smith v. New York R. Co.*, 29 Barb. (N. Y.) 132; but the intention to do so must be shown by unequivocal terms. It has been held that the words "from whatsoever cause arising" does not cover a loss arising from the negligence of the carrier. *Mynard v. Syracuse R. Co.*, *supra*; *Magnin v. Dinsmore*, 56 N. Y. 168; *Blair v. Erie R. Co.*, 66 N. Y. 313; *Wells v. Steam Nav. Co.*, 8 N. Y. 375; *Knell v. U. S. Steamship Co.*, 33 N. Y. Super. Ct. 423.

A contract that the carrier shall not be liable for loss in any sum over \$50 does not have the effect to relieve the carrier from responsibility for negligence. *Westcott v. Fargo*, 61

N. Y. 543; *Vroman v. American Express Co.*, 2 Hun (N. Y.) 512; *Magnin v. Dinsmore*, 38 N. Y. Super. Ct. 248.

Generally the courts refuse to allow the exemption in case of gross negligence, though specially contracted for. *Indiana R. Co. v. Mundy*, 21 Ind. 48; *Jacobus v. St. Paul R. Co.*, 20 Minn. 125.

Most of the cases hold that the carrier cannot by stipulation exempt itself from liability for its own negligence or that of its servants of any degree. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Flinn v. Philadelphia R. Co.*, 1 Houst. (Del.) 469; *Cleveland R. Co. v. Curran*, 19 Ohio St. 1; *Indianapolis R. Co. v. Allen*, 31 Ind. 394; *Davulson v. Graham*, 2 Ohio St. 132; *Mobile R. Co. v. Hopkins*, 41 Ala. 486; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Roe v. Lockwood*, 17 Wall. (U. S.) 357; *School District v. Boston R. Co.*, 102 Mass. 552; *Southern Express Co. v. Crook*, 44 Ala. 468; *Christenson v. American Express Co.*, 15 Minn. 270; *Michigan R. Co. v. Heaton*, 31 Ind. 397; *Mobile R. Co. v. Hopkins*, 41 Ala. 446; *Lawson Carriers*, sec. 28 et seq.; *Kallman v. U. S. Express Co.*, 3 Kan. 205; *Ashmore v. Pennsylvania R. Co.*, 28 N. J. L. 180; *Evansville R. Co. v. Young*, 28 Ind. 516; *Southern Express Co. v. Moon*, 39 Miss. 822; *Stedman v. Western Trans. Co.*, 48 Barb. (N. Y.) 97; *Seller v. Pacific*, 1 Oregon 409; *American Express Co. v. Sands*, 55 Pa. St. 53; *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335; *Steele v. Townsend*, 1 Ala. Sel. Cas. 201, 37 Ala. 247; *Reno v. Hogan*, 12 B. Mon. (Ky.) 63; *Pennsylvania R. Co. v. Schwartzenberger*, 45 Pa. St. 208, 84 Am. Dec. 490; *Beckman v. Shouse*, 5 Rawle (Pa.) 189; *Bingham v. Rodgers*, 6 W. & S. (Pa.) 500, 40 Am. Dec. 585; *Laing v. Colder*, 8 Pa. St. 484, 49 Am. Dec. 533; *Indianapolis R. Co. v. Cox*, 29 Ind. 360; *Jones v. Vorhees*, 10 Ohio, 145; *Graham v. Davis*, 40 Ohio St. 362; *Welsh v. Pittsburgh R. Co.*, 10 Ohio St. 65; *Cleveland R. Co. v. Curran*, 19 Ohio St. 1; *Maslin v. Baltimore R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748; *International R. Co. v. Folts*, 3 Tex. Cir. App. 644; *Louisville R. Co. v. Hedger*, 9 Bush (Ky.) 645; *Maslin v. Baltimore R. Co.*, 14 W. Va. 180.

For a full examination of the authorities on this subject, see *Lawson on Contracts of Carriers*.

The court in *Roe v. Lockwood*, *supra*, waived the question as to whether this rule would apply to a passenger travelling on a pass. See *Griswold v. New York R. Co.*, 53 Conn. 372, where that question is discussed, but not decided.

In Michigan it was held, in *Flint & P. Marquette R. Co. v. Weir*, 37 Mich. 111, that where one is riding on a free pass the carrier is only liable as a gratuitous bailee. But to the contrary see *Malone v. Boston R. Co.*, 12 Gray (Mass.) 388; *Bean v. Green*, 12 Me. 422; *Mobile R. Co. v. Hopkins*, 41 Ala. 493; *Thompson Carriers*, 524.

In *Annas v. Milwaukee R. Co.*, 67 Wis. 46, 27 Am. & Eng. R. Cas. 102, 57 Am. Rep. 388, it is held that where one receives a free pass the carrier may contract from immunity from damages caused by the negligence of its servants, except where such negligence is gross or criminal.

The carrier cannot free itself from liability by contract for loss of baggage caused by the wilful act or tort of its employés, *Jacobus v. St. Paul R. Co.*, 20 Minn. 125; *Mobile R. Co. v. Hopkins*, 41 Ala. 486; or by their gross negligence, *Indiana R. Co. v. Mundy*, 21 Ind. 51.

Contracts limiting the liabilities of carriers are to be construed most strongly against them. *Cream City R. Co. v. Chicago R. Co.*, 63 Wis. 97, 21 Am. & Eng. R. Cas. 70; *Black v. Goodrich Transportation Co.*, 55 Wis. 97; *Earle v. Cadmus*, 2 Daly (N. Y.) 237; *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64; *Atwood v. Reliance Trans. Co.*, 9 Watts (Pa.) 87; *Bingham v. Rogers*, 6 W. & S. (Pa.) 495; *St. Louis R. Co. v. Smuck*, 49 Ind. 302.

In *Camden R. Co. v. Burke*, 13 Wend. (N. Y.) 611, cited 28 N. Y. 615, it was held that a printed notice posted up in various parts of a carrier's steamer, "All baggage at the risk of the owner" would relieve the carrier from loss where the loss occurred by reason of theft or robbery, but not where it occurred by reason of the want of care of the carrier, of its servants, or where the loss occurred from defective machinery.

In North Carolina it is held that by special notice brought to the knowledge of the owner the carrier may qualify his liability for loss of brittle, perishable, or unusually valuable articles; and that by special contract the carrier may relieve himself from loss by fire. *Smith v. North Carolina R. Co.*, 64

N. Car. 235. Such notice must appear to have been actually given to the passenger, or it must be shown that he knew of it, or that by reason of general and notorious usage he ought to have known it. *Macklin v. New Jersey Steam Nav. Co.*, 7 Abb. Pr. N. S. (N. Y.) 229.

The burden of proof to show a limitation of the common-law liability of a carrier rests upon him, "and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful or conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties." *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 383; *Burke v. South Eastern R. Co.*, 41 L. T. N. S. 554.

If a passenger signs a contract limiting the responsibility of the carrier, he will not be absolved from it by saying that he did not read it, unless fraud or deception is practised on him. *Bate v. Canadian Pac. R. Co.*, 15 Ont. App. 338, 37 Am. & Eng. R. Cas. 208; *Louisville R. Co. v. Nicholai*, 4 Ind. App. 119; *Steers v. Liverpool R. Co.*, 57 N. Y. 5.

A contract independent of the ticket may be proved. *Van Buskirk v. Roberts*, 31 N. Y. 661.

The baggage-master of a railway company has a right to act for it in making contracts for the carriage of baggage. *Isaacson v. Hudson River R. Co.*, 94 N. Y. 278, 16 Am. & Eng. R. Cas. 188. And any restriction on his powers is not binding on persons having no notice thereof. *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293; *Minter v. Pacific R. Co.*, 41 Mo. 503; *Hannibal R. Co. v. Swift*, 12 Wall. (U. S.) 262; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30; *Chicago R. Co. v. Conklin*, 32 Kan. 55; *Ross v. Missouri, K. & T. R. Co.*, 4 Mo. App. 582; *Strouss v. Wabash, St. L. & P. R. Co.*, 17 Fed. Rep. 209; *Mauritz v. New York, L. E. & W. R. Co.*, 23 Fed. Rep. 765; 21 Am. & Eng. R. Cas. 286. *Contra*, *Alling v. Boston & A. R. Co.*, 126 Mass. 121; *Blumantee v. Fitchburg R. Co.*, 127 Mass. 322.

Courts have been generally hostile to the doctrine that the

liability of a carrier for baggage can be limited by a mere notice of any kind without evidence of the assent of the passenger beyond the mere reception of a ticket or check containing such notice. But the want of harmony in the adjudicated cases is conspicuous.

The Supreme Court of the United States has taken a very unfavorable view of the efforts made by carriers to limit their liability by printed conditions in bills of lading or other papers delivered to shippers. In *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 329, the court said:

“It is not only against the policy of the law, but a serious injury to commerce, to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other there might be some show of reason for assuming acquiescence from silence; but in the nature of the case this equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights.

“It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed, such an action is seldom resorted to, on account of the inability of the shipper to delay sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of the common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community.”

That was not a case relating to baggage; but the reasoning

of the court applies with full force to the subject under discussion, since passengers' tickets and checks are usually received under circumstances less favorable to deliberation than those which commonly attend the issue of bills of lading for goods.

A passenger buying tickets does not usually understand that he is making a contract with the carrier issuing it; but supposes that he is simply receiving a check showing that his fare has been paid over the line to the place named in the ticket. *Kansas City R. Co. v. Rudebaugh*, 38 Kan. 45, 34 Am. & Eng. R. Cas. 219. Such a ticket or a check for baggage is merely a voucher, showing the payment of the fare, or the receipt of baggage, and is no proof of any agreement between the parties. *Baltimore R. Co. v. Campbell*, 36 Ohio St. 647, 3 Am. & Eng. R. Cas. 246; *Davis v. Chicago R. Co.*, 83 Iowa 744. See note to *Mauritz v. New York R. Co.*, 23 Fed. Rep. 765, 21 Am. & Eng. R. Cas. 286; *The Pacific*, Deady (U. S.) 17; *Wilson v. Chesapeake R. Co.*, 21 Grat. (Va.) 654; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97. In the last-named case the court said: "A mere passenger ticket in the form in general use would not naturally induce the reading of its contents. The party receiving it might well suppose that it was a mere check signifying that he had paid his passage to the place indicated in his ticket."

It is generally held that the mere knowledge on the part of the passenger of a condition printed or written on a check, ticket, receipt, or other paper, or posted up in an office or other place before commencing his journey is not sufficient evidence of his assent to it, but that the burden of proof is on the carrier to show that the passenger agreed to the terms thus proposed. *Baltimore R. Co. v. Campbell*, 36 Ohio St. 647, 3 Am. & Eng. R. Cas. 647, 38 Am. Rep. 617; *Kent v. Baltimore R. Co.*, 45 Ohio, 284, 31 Am. & Eng. Cas. 125; *Kansas City R. Co. v. Rudebaugh*, 38 Kan. 45, 34 Am. & Eng. R. Cas. 219; *Limburger v. Westcott*, 49 Barb. (N. Y.) 283; *London Ins. Co. v. Rome R. Co.*, 68 Hun (N. Y.) 598, 23 N. Y. Supp. 231; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225, 234; *Newell v. Smith*, 29 Vt. 255; *Western Transportation Co. v. Newhall*, 24 Ill. 466; *Baldwin v. Collins*, 9 Rob. (La.) 468; *Lake Shore*

R. Co. v. Greenwood, 79 Pa. St. 373; *Peck v. Weeks*, 34 Conn. 145; *Burnham v. Grand Trunk R. Co.*, 63 Me. 298, 18 Am. Rep. 220; *Camden R. Co. v. Belknap*, 21 Wend. (N. Y.) 354; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234; *Potts v. Wabash R. Co.*, 17 Mo. App. 394; *Slocumb v. Fairchild*, 7 Hill (N. Y.) 292; *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. (N. Y.) 229; *Sears v. Eastern R. Co.*, 14 Allen (Mass.) 437; *Grace v. Adams*, 100 Mass. 508; *Quimby v. Vanderbilt*, 17 N. Y. 313; *Williams v. Vanderbilt*, 28 N. Y. 222. *The Majestic*, 56 Fed. Rep. 244; *Henderson v. Stevenson*, L. R. 2 H. L. S. C. 470; *Moses v. Boston R. Co.*, 32 N. H. 523, 64 Am. Dec. 381, and note; *Kimball v. Rutland R. Co.*, 26 Vt. 247, 62 Am. Dec. 567, and note; *Freeman v. Newton*, 3 E. D. Smith (N. Y.) 246; *Cole v. Goodwin*, 19 Wend. 251; *Clerk v. Faxon*, 21 Wend. (N. Y.) 153; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485; *Fibel v. Livingston*, 64 Barb. (N. Y.) 179; *Clark v. Faxon*, 21 Wend. (N. Y.) 153; *Powell v. Meyers*, 26 Wend. (N. Y.) 591; *Farmer's Bank v. Champlain Trans. Co.*, 23 Vt. 186; *Bean v. Green*, 12 Me. 422. So held where a receipt was given for baggage, which receipt limited the amount of recovery to \$100, the passenger not having read the condition. *Woodruff v. Sherard*, 9 Hun (N. Y.) 322. See also *Grossman v. Dodd*, 17 N. Y. Supp. 855.

Notwithstanding the above decisions, a carrier may doubtless make for his own protection and the greater protection of the baggage such reasonable regulations as to checking, custody, and carriage of it as may be suggested by reason and experience. *Thompson Carriers*, 529; *Gleason v. Goodrich Transp. Co.*, 32 Wis. 86; *Baldwin v. Collins*, 9 Rob. (La.) 468; *Freeman v. Newton*, 3 E. D. Smith (N. Y.) 246. And these, if brought to the notice of the passenger, would no doubt be binding on him. Not so, however, if such regulations were in violation of the charter of the corporation of the carrier. *Munster v. South Eastern R. Co.*, 4 C. B. (N. S.) 676. In *Gleason v. Goodrich Transportation Co.*, 32 Wis. 85, it was held that notices put up in a steamboat as to the delivery of baggage was binding on passengers if informed of the rules contained therein, and if they were reasonable. In that case the court said: "The consent of the passenger to such conditions

is not necessary. It is enough that he knows them, and, that fact being ascertained, compliance with them will be required by law."

The carrier may qualify his liability by a general notice of any reasonable requisition to be observed as to the manner of delivery, entry of parcels, information of contents, rates of freight, and the like; but he cannot thus limit the liability imposed on him by the common law or by public policy. *Merriman v. May Queen*, Newb. Adm. 464; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344.

The case of *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64, 12 Fed. Cases, 495, can hardly be reconciled with the rulings made by the Supreme Court of the United States. In that case it appeared that an expressman gave to a passenger a check containing a printed notice that the former would not become liable "for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss by fire, nor for an amount exceeding \$100 upon any article unless specially agreed for in writing on this check receipt, and the extra risk paid therefor." The court held that the passenger was bound by this notice, though he did not read it; but that the language of the paper should be construed against the carrier. The words "any article" were accordingly held not to mean any piece of baggage and its contents, but any article contained in any piece of baggage. The result was that the plaintiff recovered a judgment for \$700.

In Pennsylvania it is held that a passenger is bound by a notice limiting or disclaiming responsibility for baggage printed on his ticket, and contained on placards in the ticket office of the carrier; though the court expressed regret that this rule had been established by previous decisions. *Laing v. Colder*, 8 Pa. St. 479; *Pennsylvania R. Co. v. Raiordan*, 119 Pa. St. 581. But the terms of the notice must be explicit, and free from ambiguity. *Camden R. Co. v. Baldauf*, 16 Pa. St. 77. The notice must be brought home to the passenger, *Pennsylvania R. Co. v. Schwarzenberger*, 45 Pa. St. 215. In *Farnham v. Camden R. Co.* 55 Pa. St. 58, it is said that the liability may be limited by contract, and "perhaps by notice."

In *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, which was a case growing out of a loss of baggage, BRONSON, J., said :

“ Now the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms ; and a notice can at the most only amount to a proposal for a special contract which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice cannot warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier than it does that he intended to insist on the liabilities imposed by law ; and a special contract cannot be implied where there is such an equipoise of probabilities.”

In Iowa and Texas all contracts and regulations limiting the liability of common carriers are rendered void by statute.

In Indiana it is held that the liability of the carrier can only be limited by express contract, and that the receipt by a passenger of a ticket on which was printed these words : “ In consideration of free carriage, its (the trunk’s) value is agreed to be limited to \$100,” does not show any contract. To the same effect see *Malone v. Boston R. Co.*, 12 Gray (Mass.) 388.

In *Henderson v. Stevenson*, 2 Scotch App., 13 Moak’s Rep. 141, the plaintiff had received a ticket which contained no condition on its face, but on the back of which was printed one that absolved the defendant carrier from all liability for loss of baggage ; but this printed matter on the back of the ticket was not referred to on the face of it, and it was shown that the passenger had not read the condition before entering on his journey. The court held (overruling *Zunz v. South Eastern R. Co.*, L. R. 4 Q. B. 544), that the plaintiff had not assented to the condition, and that he was not bound by it. See note to *Henderson v. Stevenson*, 13 Moak’s Rep. 141.

A carrier, after receiving a passenger’s baggage, cannot limit his responsibility by a notice printed on a ticket afterwards purchased. *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225.

Notices tending to deceive or mislead the passenger, as

where they were printed in obscure places, or in fine print, have always been rejected as ineffectual unless his attention was particularly called to the notice, and his assent secured. *Clayton v. Hunt*, 3 Campb. 27; *Verner v. Schweitzer*, 32 Pa. St. 208; *Butler v. Hearne*, 2 Campb. 415; *Lawson on Contracts of Carriers*, sec. 123.

In *Malone v. Boston R. Co.*, 12 Gray (Mass.) 388, a ticket had printed on the back of it a limitation of the liability of the carrier for baggage printed in small type, the face of the ticket having printed on it the words, "*Look on the back.*" The court held that this fact did not have the effect to limit the responsibility of the carrier, and that the fact that printed notices containing like limitations were posted up in the cars did not change the result. The printing of such notices in small type so as to render them inconspicuous has always been regarded as evidence of a fraudulent intent to mislead. *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 100; *Butler v. Heave*, 2 Campb. 415; *Davis v. Willan*, 2 Stark. 279; *Kerr v. Willan*, 2 Stark. 53; *Macklin v. Waterhouse*, 5 Bing. 212.

Where a sleeping car company sells a ticket containing the words, "wearing apparel or baggage placed in the car will be entirely at the risk of the owners," this will not relieve the railway company from liability for lost baggage. *Louisville R. Co. v. Katzenberger*, 16 Lea, 380, 57 Am. Rep. 232; *Cleveland, C. C. & I. R. Co. v. Walrath*, 38 Ohio St. 461, 8 Am. & Eng. R. Cas. 371, 43 Am. Rep. 433; *Illinois R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846.

The liability of a carrier in respect of baggage is not limited by a notice printed on the face of a ticket issued to the passenger stating the terms on which the baggage will be carried unless his attention is called to the notice when buying the ticket, or unless it appears that he was negligent in failing to read the conditions on the ticket. *Kent v. Milland R. Co.*, 10 Q. B. 1; *Wilson v. Chesapeake R. Co.*, 21 Gratt. (Va.) 676; *Mauritz v. New York R. Co.*, 23 Fed. Rep. 765, 21 Am. & Eng. R. Cas. 286. Such a notice printed in English was held not to affect a passenger who could not read the English language. *Camden R. Co. v. Baldauf*, 16 Pa. St. 67.

Discovery of a condition after a journey has commenced

will not affect the rights of the passenger. *Ransom v. Pennsylvania R. Co.*, 48 N. Y. 212, 3 Am. Ry. Rep. 528, affirming s. c. 2 Abb. Pr. N. S. 220; *Kent v. Baltimore R. Co.*, 45 Ohio St. 284, 31 Am. & Eng. R. Cas. 125; *Prentice v. Decker*, 49 Barb. (N. Y.) 21; *Camden R. Co. v. Baldauf*, 16 Pa. St. 67. So where the passenger is unable to read. *Davis v. Willan*, 2 Stark. 279; note to *Smith v. Horne*, Holt 646. Where the ticket declared that the carrier would not be responsible for baggage in excess of \$100, it was held that the passenger was not bound thereby in the absence of special agreement. *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 226. In *Madan v. Sherard*, 73 N. Y. 330, the question as to whether the passenger knew of a notice of this kind, and assented to it, was left to the jury; the court holding that the mere acceptance of a receipt containing such a notice did not show any contract to limit the liability of the carrier. See also *Blossom v. Dodd*, 116 N. Y. 264; *Prentice v. Decker*, 49 Barb. (N. Y.) 21; *Limburger v. Westcott*, 49 Barb. (N. Y.) 283; *Sunderland v. Westcott*, 2 Sweeny (N. Y.) 260; *Woodruff v. Sherard*, 9 Hun 322.

Where a ticket was presented to a passenger with a statement that she should sign it for purposes of identification, and nothing was said about a condition printed on it limiting the responsibility of the carrier to \$100 for loss of wearing apparel, and the passenger, having sore eyes, could not read the condition, it was held that the condition was not binding on her. *Anderson v. Canadian Pac. R. Co.*, 17 Ont. Rep. 747, 40 Am. & Eng. R. Cas. 624.

So where a passenger was given a receipt for baggage at night in a dimly lighted car that was running rapidly, the receipt containing a condition that was obscurely printed, and there was no evidence that he consented to the condition, it was held that he was not bound thereby. *Blossom v. Dodd*, 43 N. Y. 264.

Where one had tickets over a certain line of railway from New York to New Orleans, which he gave to the baggage-master of a railway company when he applied to have his baggage checked, and the baggage-master gave him a check showing by numerous letters and abbreviations that the bag-

gage would be sent over a different line, and the passenger failed to examine the check, it was held that the common-law liability of the carrier was not waived. *Isaacson v. New York R. Co.*, 94 N. Y. 278, 16 Am. & Eng. R. Cas. 188.

As passengers on steamships usually purchase their tickets in advance of the time of the sailing, it has been supposed that they examine their tickets before embarking; and hence they are held to have acquiesced in any reasonable conditions that may be written or printed on them. So held where the carrier's liability was thus limited to fifty pounds, it appearing that the passenger had time to examine the ticket before sailing. *Potter v. The Majestic*, 60 Fed. Rep. 624, 9 C. C. A. 161. In that case the purchaser of the ticket did not in fact read it before the commencement of the journey; but he had ample time to read it.

So the conditions printed on the back of a "thousand mile" ticket are binding on the purchaser. *Terre Haute R. Co. v. Fitzgerald*, 47 Ind. 79.

But where a steamship ticket contained a like condition, but the passenger was required to pay extra freight on his baggage, it was held that the condition was inoperative. *Wasserberg v. Cunard Steamship Co.*, 28 N. Y. Supp. 250, 8 Misc. Rep. (N. Y.) 78.

In *Steers v. Liverpool Steamship Co.*, 57 N. Y. 1, such a ticket was bought and signed by the agent of the plaintiff. It provided that the carrier should not be liable in any event for more than \$50 unless a bill of lading or receipt was signed therefor, specifying the articles and their value, and that money, jewelry, and all valuables were at the passenger's risk, unless placed in the charge of the company, and a bill of lading or receipt should be signed therefor. On going on board, the trunk of the plaintiff was put in the custody of the defendant's agent, who assumed to take charge of it; at the end of the voyage the defendant did not produce it or account for it. It was held that there could be no recovery for more than \$50, though there was gross negligence on the part of the carrier.

Assent will be presumed from the taking, retention, and use of a commutation ticket. *Louisville R. Co. v. Harriss*, 9 Lea

(Tenn.) 80, 42 Am. Rep. 668. *Bland v. Southern Pacific R. Co.*, 55 Cal. 570, 3 Am. & Eng. R. Cas. 285, 36 Am. Rep. 50.

In *Anderson v. Canadian Pacific R. Co.*, 17 Ont. Rep. 747, 40 Am. & Eng. R. Cas. 624, the passenger's ticket contained these words: "In consideration of the reduced rate at which this ticket is sold, I hereby agree to all the provisions of the above contract," one of which was that the carrier should not be liable for baggage beyond the value of \$100. It appeared that the ticket was not sold at a reduced rate, and that it was not signed by the passenger. The court held that there was no contract limiting the liability of the carrier as to the amount of recovery.

Where the passenger signed an agreement that the carrier did not assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding \$100, and the baggage was broken open during transit, and \$300 worth of wearing apparel, jewelry, etc., were taken out, and the carrier would not account for a refusal to deliver the baggage, the presumption is that it has been guilty of negligence, and the passenger may recover the full amount of the loss. *Louisville R. Co. v. Nicholai*, 4 Ind. App. 119.

As we have seen in *Steers v. Liverpool Steamship Co.*, in a similar case the court inferred negligence on the part of the carrier, but held that the recovery could not exceed the amount named in the ticket.

Contracts of carriers limiting their responsibility for baggage which are unreasonable, inconsistent with any statute, or with their duties to the public will not be enforced by the courts. *New York R. Co. v. Fraloff*, 100 U. S. 24. Where a travelling salesman shipped his samples, receiving a brass check, and also an excess-baggage coupon ticket, which provided that it should be surrendered with the brass check in order to get the baggage, it was held that this requirement was not unreasonable. *Texas R. Co. v. Willis*, 3 Tex. App. (Civ. Cas.) 94. But a regulation of a carrier that it will not be responsible for baggage unless fully and properly addressed, with the name and destination of the owner thereon, is not a reasonable one. *Cutter v. North London R. Co.*, 19 Q. B. Div. 64, 31 Am. & Eng. R. Cas. 105. So a by-law of a

carrier company providing that it shall not be responsible for baggage until it is booked and paid for, is unreasonable.

Williams v. Great Western R. Co., 10 Exch. 15. Where the plaintiff's ticket contained a condition limiting the carrier's liability for loss of baggage to \$50, and her baggage, containing the wearing apparel of herself and two children, was lost on the way, it was held that the condition was unreasonable. *Glovinski v. Cunard Steamship Co.*, 4 Misc. (N. Y.) 266. So a limitation of the liability of the carrier for loss of baggage to a recovery for wearing apparel not to exceed \$100, was held to be unreasonable. *Davis v. Chicago R. Co.*, 83 Iowa 744, 15 Am. & Eng. R. Cas. 424.

A regulation that passengers should not take their baggage into the state-room of a steamboat was held unreasonable as applied to satchels such as travellers usually take to their sleeping apartments. *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. (N. Y.) 229.

The question of reasonableness is one for the court where the facts are undisputed. *Vedder v. Fellows*, 20 N. Y. 126. Otherwise it is a mixed one of law and fact, and should be left to a jury. *Thompson Carriers*, 335.

A carrier may by notice brought home to the passenger, require him to state the nature and value of his baggage, and if the passenger give an answer false in a material point, the carrier will be absolved from the consequences of a loss not occasioned by negligence or misconduct. *Hollister v. Nowlin*, 19 Wend. (N. Y.) 234.

Under a New Jersey statute a carrier may limit his liability for baggage to \$100 by placing a notice to that effect in some conspicuous place in the receiving office for baggage, and inserting it in tickets given to passengers. Under this statute both methods must be pursued. *Brown v. Camden R. Co.*, 83 Pa. St. 316.

Where a carrier gives notice that he will not be responsible for baggage unless certain conditions are complied with, he must give the passenger an opportunity to comply with such conditions. Thus a regulation made by a carrier that he will not be responsible for baggage that is not checked will be ineffectual where the passenger takes his baggage to the

proper place where baggage is usually checked, and demands a check from the agent of the carrier, but is told that another agent, whose duty it is to give checks, is absent, and the baggage is injured or lost. *Freeman v. Newton*, 3 E. D. Smith (N. Y.) 246.

An act of congress limiting the liability of carriers by water of goods or merchandise in case of fire unless caused by design or neglect of the carrier was held to apply to baggage. *U. S. Rev. St. sec. 4282*; *Chisholm v. Northern Transp. Co.*, 61 Barb. (N. Y.) 363; *Chamberlain v. Western Transp. Co.*, 44 N. Y. 305. Held otherwise, however, in *Dunlap v. International Steamboat Co.*, 98 Mass. 371.

A carrier cannot prove a contract limiting his liability unless it has been pleaded. *Westcott v. Fargo*, 61 N. Y. 542.

The question whether the passenger knew or assented to the condition printed or written on a ticket or check before the commencement of his journey is a question for the jury, unless the facts are undisputed, in which case the question must be decided by the court. *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Kent v. Baltimore & O. R. Co.*, 45 Ohio St. 288, 31 Am. & Eng. R. Cas. 125.

In New York it is held that the burden of proving negligence is on the plaintiff; *Cochran v. Dinsmore*, 49 N. Y. 249, and mere non-delivery is not sufficient proof of misfeasance to show a conversion. *Magnin v. Dinsmore*, 70 N. Y. 410. Elsewhere it is held that in order to avail himself of a special contract limiting his liability the carrier must show that he took reasonable care of the baggage. *Adams v. Stettaners*, 61 Ill. 184.

The carrier must first show that such a contract was made under circumstances indicating fairness and good faith; and then the onus is on the plaintiff to show that by reason of duress, fraud, or collusion it ought not to be enforced. *Adams Express Co. v. Guthrie*, 9 Bush (Ky.) 78.

The doctrine that a carrier may restrict his liability by contract does not change the rule as to the burden of proof as to negligence; and the loss of baggage in his hands raises a presumption of negligence which he must rebut before he can avail himself of the limitation. *Drew v. Red Line Co.*, 3

Mo. App. 495; *Gray v. Mobile Trade Co.*, 55 Ala. 387; *Lupe v. Atlantic R. Co.*, 3 Mo. App. 77; *Brown v. Adams Express Co.*, 15 W. Va. 812.

Contracts of this kind for service to be performed by carriers on lines extending through different states, if valid where made, will be enforced in another state where such contracts are not permitted. *Talbott v. Merchants' Transp. Co.*, 41 Iowa 247; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553.

WHAT IS BAGGAGE.

As Mr. J. Field said in *Hannibal R. Co. v. Swift*, 12 Wall. (U. S.) 272, the contract of the carrier to carry the passenger "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travellers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." See, also, *New York R. Co. v. Fraloff*, 100 U. S. 29, and cases cited in the opinion.

Great difficulty arises, however, in the application of this rule. We can only note the results of adjudicated cases.

In *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612, it is said by COCKBURN, C.J., that baggage includes not only all articles of apparel, whether for use or ornament, but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of a student, and other articles of an analogous character, the use of which is personal to the traveller.

It is not necessary that the articles constituting baggage shall be intended for the use, comfort, or convenience of the passenger on his journey. If they be such as are usually carried by travellers in their baggage, such as a reasonable amount of wearing apparel, and of the common conveniences of life, such as one may reasonably take with him on a journey, the carrier will be liable for them as baggage, though the passenger may not have expected to use them on his travels. *Hutchinson Carriers*, sec. 686; *Dexter v. Syracuse R.*

Co., 42 N. Y. 326; *Curtis v. Delaware R.*, 74 N. Y. 116; *Toledo R. Co. v. Hammond*, 33 Ind. 379.

Members of the same family travelling together may carry each other's effects. *Curtis v. Delaware R. Co.*, 74 N. Y. 116; *Dexter v. Syracuse R. Co.*, 42 N. Y. 326.

A travelling salesman's illustrated catalogue, used by him in his business, was held to be personal baggage. *Staub v. Kendrick*, 121 Ind. 226, 40 Am. & Eng. R. Cas. 632.

The value of the baggage may vary according to the length, character and purposes of the journey, and the station in life of the passenger. In *New York R. Co. v. Fraloff*, 100 U. S. 24, a Russian lady of wealth, high rank, and high social standing, while travelling on a railway, had one of her trunks broken open by a thief, who stole therefrom laces, which she testified were worth \$75,000. A jury returned a verdict in her favor for \$10,000, and on error the judgment entered on the verdict was affirmed.

Baggage of course includes clothing. *Dibble v. Brown*, 12 Ga. 217; *Doyle v. Kiser*, 6 Ind. 242; *Baltimore R. Co. v. Smith*, 23 Md. 402; *Duffy v. Thompson*, 4 E. D. Smith (N. Y.) 178; *Munster v. Southeastern R. Co.*, 4 C. B. N. S. 738. It is not necessary that the clothes shall be ready for use. A quantity of clothes cut into patterns for garments is within the rule. *Duffy v. Thompson*, *supra*. Manuscript books of a student, *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64; a manuscript price book which a commercial agent took in his valise, and used in making sales to ascertain the price of goods; *Gleason v. Transportation Co.*, 32 Wis. 85; *Staub v. Kendrick*, 121 Ind. 226, 40 Am. & Eng. R. Cas. 632; a woman's jewels, and all articles of her wardrobe necessary or convenient in her travelling, *Mauritz v. New York, L. E. & W. R. Co.*, 23 Fed. Rep. 765, 21 Am. & Eng. R. Cas. 286; *New York R. Co. v. Fraloff*, *supra*; *Torpey v. Williams*, 3 Daly (N. Y.) 162; *Pettigrew v. Barnam*, 11 Md. 434; *Brooke v. Pickwick*, 4 Bing. 218; *McGill v. Rowand*, 3 Pa. St. 451, dresses and materials for dresses bought for one's family, *Dexter v. Syracuse R. Co.*, 42 N. Y. 326, were all held to be embraced within the term baggage.

In an early case a gentleman was allowed a pocket pistol and a pair of duelling pistols, *Woods v. Devin*, 13 Ill. 746.

but in a later case one pistol was thought to be enough for a grocer going into the country to buy butter. *Chicago R. Co. v. Michigan R. Co.*, 56 Ill. 212; *Dano v. Michigan R. Co.*, 22 Ill. 278. A few books for amusement and entertainment of the passenger are within the rule. *Doyle v. Aiser*, 6 Ind. 242; but not a manuscript intended for publication. *Hannibal R. Co. v. Swift*, 12 Wall. (U. S.) 262. A mechanic is allowed for a reasonable quantity of tools; *Kansas City R. Co. v. Morrison*, 34 Kan. 502, 23 Am. & Eng. R. Cas. 481; *Porter v. Hildebrand*, 14 Pa. St. 129; *Davis v. Cayuga R. Co.*, 10 How. Pr. (N. Y.) 330; and so a surgeon in the army travelling with troops recovered for a case of surgical instruments, *Hannibal R. Co. v. Swift, supra*.

Though the passenger make a journey by night, yet he may include an opera-glass as part of his baggage. *Toledo R. Co. v. Hammond*, 33 Ind. 379. So of night glasses or telescopes carried by one intending to cross the ocean. *Cadwallader v. Grand Trunk R. Co.*, 9 L. C. 169. So of a bed, pillows, bolster, and bed quilts belonging to a poor man who is travelling with his family. *Ouimit v. Henshaw*, 35 Vt. 604. *Parmelee v. Fischer*, 22 Ill. 212. These last two cases, perhaps, mark the extreme limit to which the courts have gone. Six pairs of sheets and an equal number of blankets and quilts were excluded where the passenger was travelling from Canada to London, where he expected to provide himself with a home. *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612. Guns when taken with the passenger for sporting purposes constitute a part of the baggage. *Hawkins v. Hoffman*, 6 Hill (N. Y.) 506; *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 454; *Davis v. Cayuga R. Co.*, 10 How. Pr. (N. Y.) 330. Also watches and jewels intended to be worn on the person. *Contract Co. v. Cross*, 8 Bush (Ky.) 472, 8 Am. Rep. 471; *Jones v. Voorhees*, 10 Ohio, 145; *Coward v. East Tennessee R. Co.*, 16 Lea (Tenn.) 225; *McGill v. Roland*, 3 Pa. St. 451; *Torpey v. Williams*, 3 Daly (N. Y.) 162; *McDougall v. Allan*, 12 L. C. 321; *Michigan R. Co. v. Carrow*, 73 Ill. 348; *McCormick v. Hudson River R. Co.*, 4 E. D. Smith (N. Y.) 181.

But a watch in a trunk was held not to be baggage in *Bomar v. Maxwell*, 9 Humph. (Tenn.) 620.

Handcuffs and medicines were excluded in the case last cited. As to the handcuffs there may be doubt; but there is no reason for disallowing a reasonable quantity of medicines, which, in many cases, may be more necessary than a change of wearing apparel.

A gold watch, a pair of gold spectacles, and \$11 in money were allowed as baggage in *Walsh v. The H. M. Wright*, Newb. Adm. 494.

Where a lady put her gold watch in a trunk, it was held to be baggage, the court saying that she might well put it there for additional security. *American Central Co. v. Cross*, 8 Bush (Ky.) 472; *Jones v. Voorhees*, 10 Ohio, 145.

And so of a reasonable amount of jewels, *McCormick v. Hudson R. Co.*, 4 E. D. Smith (N. Y.) 181; but jewelry of the value of \$30,000 carried in a trunk was held not to be baggage, *Michigan Central R. Co. v. Carrow*, 73 Ill. 348.

Where a passenger wears a watch on his person, and carries several other watches in his trunk, the latter are not a part of his personal baggage. *Mississippi R. Co. v. Kennedy*, 41 Miss. 671.

A reasonable amount of money or bank bills for the expenses of the journey is also included. *Fairfax v. New York Cent. & H. R. Co.*, 73 N. Y. 167; *Doyle v. Kiser*, 6 Ind. 242; *Bomar v. Maxwell*, 9 Humph. (Tenn.) 621, 51 Am. Dec. 682; *Dunlap v. International Co.*, 98 Mass. 371; *Weed v. Saratoga R. Co.*, 19 Wend. (N. Y.) 534; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129; *Toledo R. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221; *Mad River R. Co. v. Fulton*, 20 Ohio, 318; *Jones v. Voorhees*, 10 Ohio, 180; *Hutchings v. Western R. Co.*, 25 Ga. 61. But not money carried for other purposes. *Merrill v. Grinnell*, 30 N. Y. 594; *Jordan v. Fall River Co.*, 5 Cush. (Mass.) 69; *Dibble v. Brown*, 12 Ga. 217; *Grant v. Newton*, 1 E. D. Smith (N. Y.) 95; *Whitmore v. Steamer Carolina*, 20 Mo. 513; *Hickox v. Naugatuck R. Co.*, 31 Conn. 281; *Phelps v. London R. Co.*, 19 C. B. N. S. 321; *Butcher v. London R. Co.*, 16 C. B. 13; *Cincinnati R. Co. v. Marcus*, 38 Ill. 219; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85; *First National Bank v. Marietta R. Co.*, 20 Ohio St. 259, 5 Am. Rep. 655; *Weed v. Saratoga R. Co.*, 19 Wend. (N. Y.) 534;

Illinois R. Co. v. Copeland, 24 Ill. 332. Money carried for the purpose of buying clothing is not included as baggage. *Hickox v. Nangatuck R. Co.*, *supra*. In some cases it is held that small sums of money intended to cover travelling expenses are not so included. *Grant v. Newton*, 1 E. D. Smith (N. Y.) 95; *Davis v. Michigan R. Co.*, 22 Ill. 278.

The amount of money to be allowed for travelling expenses must be measured not alone by the requirements of the transit over a particular part of the entire route to which the line of one class of carriers extends; but must embrace the whole of the contemplated journey and return; and includes such an allowance for accidents or sickness, and for sojourning by the way, as a reasonably prudent man would consider it necessary to make. The question as to the reasonableness of this amount is one for the jury. *Merrill v. Grinnell*, 30 N. Y. 594.

A common carrier is not liable for a large amount of gold placed in a carpet bag by the passenger without notice to the carrier, though the money is stolen by one of the carrier's servants. *Doyle v. Kiser*, 6 Ind. 242.

If a passenger has more money than is necessary for travelling expenses he should notify the carrier, and pay extra for its transportation and care, if required. *Davis v. Michigan R. Co.*, 22 Ill. 278.

Articles purchased by the passenger for himself or his family of a kind usually carried as baggage are included, though not necessary for his use or comfort on the journey; but the liability of the carrier does not extend to articles purchased for a stranger. *Dexter v. Syracuse R. Co.*, 42 N. Y. 326; *Duffy v. Thompson*, 4 E. D. Smith (N. Y.) 178.

WHAT IS NOT INCLUDED AS BAGGAGE.

Money or bank notes not intended to be used in defraying the expenses of the journey are not a part of the baggage of the passenger, *Dunlap v. Steamboat Co.*, 98 Mass. 371; *I'helps v. London & N. W. R. Co.*, 19 C. B. N. S. 321; *Pfister v. Central Pac. R. Co.*, 70 Cal. 169; nor silver knives, forks, and spoons, *Bell v. Drew*, 4 E. D. Smith (N. Y.) 59; *Giles v.*

Fauntleroy, 13 Md. 126 ; *Pettigrew v. Barnum*, 11 Md. 434 ; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586 ; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85.

Where a passenger took with him on a railway train a carpet sack containing \$87,000 in gold, silver, ore, bullion, and commercial paper, keeping it in his own custody, it was held that he was liable to pay freight in proportion to the value. *Hutchings v. Western R. Co.*, 25 Ga. 61.

In *Railroad Co. v. Berry*, 60 Ark. 431, it was held that where a passenger informed the baggage-master of a carrier that his trunk contained money, and the latter accepted it as baggage, and checked it, the carrier was liable for the loss of the money, though the amount exceeded that necessary for travelling expenses, and though by the rules of the carrier the baggage-master had no authority to receive extra money as baggage.

A sacque, muff, and silver napkin rings carried in a man's valise are no part of his baggage, *Chicago R. Co. v. Boyce*, 73 Ill. 510 ; nor masquerade costumes intended to be worn at a ball, *Michigan R. Co. v. Oehm*, 56 Ill. 293 ; nor stage properties, costumes, paraphernalia, advertising matter, and the like, *Oakes v. Northern Pac. R. Co.*, 20 Oregon 392, 47 Am. & Eng. R. Cas. 437 ; nor a feather bed not intended for use on the journey, *Connolly v. Warren*, 106 Mass. 146 ; and so of quilts, bedding, bed furnishings, curtains, table-cloths, books, pictures, and albums, *Mauritz v. New York, L. E. & W. R. Co.*, 23 Fed. Rep. 765, 21 Am. & Eng. R. Cas. 286. Whether bedding packed in a trunk of a poor man who was moving was baggage was left to the jury in *Quinit v. Henshaw, supra*.

Articles of bedding intended for future household use are not baggage though packed in trunks. *Texas R. Co. v. Ferguson*, 9 Am. & Eng. R. Cas. 395.

But where the passenger in the steerage of a vessel has to provide his own bedding, it is considered as a part of his baggage. *Hirschsohn v. Hamburg Packet Co.*, 2 Jones & S. (N. Y.) 521.

Deeds and other documents to be used on a trial, and carried by an attorney, are not a part of his baggage, *Phelps v. London R. Co.*, 19 C. B. N. S. 321 ; nor a child's spring-horse

which a father was taking home for his children, *Hudson v. Midland R. Co.*, L. R. Q. B. 366.

Ladies' jewels carried in a man's trunk are not baggage. *Metz v. California Southern R. Co.*, 85 Cal. 329, 44 Am. & Eng. R. Cas. 433.

The carrier is not liable for the loss of jewelry packed in a passenger's trunk, and intended for presents for his friends; nor for Masonic regalia, nor for engravings. *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225.

Baggage does not include two rings belonging to a male traveller, *Cadwallader v. Grand Trunk R. Co.*, 9 L. C. 169; nor a napkin ring, *Chicago R. Co. v. Boyce*, 73 Ill. 510.

General merchandise cannot be included under the head of baggage, *Belfast R. Co. v. Keyes*, 9 H. L. Cas. 556; *Cahill v. London R. Co.*, 10 C. B. N. S. 154; nor articles intended to be given as presents to friends, *Hutchinson Carriers*, sec. 685; *Cahill v. London & N. W. R. Co.*, 13 C. B. N. S. 818; *Dibble v. Brown*, 12 Ga. 217; *Chicago R. Co. v. Marcus*, 38 Ill. 219; *Pennsylvania Co. v. Miller*, 35 Ohio St. 541; *Stinson v. Connecticut River R. Co.*, 98 Mass. 83; *The Ionic*, 5 Blatch. (U. S.) 538; Nor are samples of merchandise intended to be used in making sales, *Strouss v. Wabash, St. L. & R. R. Co.*, 17 Fed. Rep. 209.

A custom of carriers to carry packages of merchandise as baggage does not render them responsible for their loss. *Alling v. Boston R. Co.*, 126 Mass. 121; *Smith v. Boston R. Co.*, 44 N. H. 325.

Where a station agent of a railway company received and checked a jeweller's trunk containing jewelry of the value of more than \$8000, the agent knowing or having reason to believe from the size, appearance, and weight of the trunk that it contained jewelry, and the trunk was destroyed by fire caused by a defective roadbed and rotten ties, it was held that the company was liable for the loss. *Central Trust Co. v. Wabash R. Co.*, 39 Fed. Rep. 417, 40 Am. & Eng. R. Cas. 636. But this case was reversed on appeal. See *Humphreys v. Perry*, 148 U. S. 627, where the authorities on this subject are extensively reviewed. It is generally held that where the carrier or his agent receives general merchandise as baggage, knowing its real quality, the carrier is

estopped from denying that it was baggage. *Hoeger v. Chicago R. Co.*, 63 Wis. 100, 21 Am. & Eng. R. Cas. 308; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612; *Butler v. Hudson River R. Co.*, 3 E. D. Smith (N. Y.) 371; *Texas R. Co. v. Capps*, 16 Am. & Eng. R. Cas. 118; *Minter v. Pacific R. Co.*, 41 Mo. 503; *Chicago R. Co. v. Conklin*, 32 Kan. 55; *Ross v. Missouri R. Co.*, 4 Mo. App. 583.

If a carrier knowingly permits a passenger to take as baggage articles that do not come under that description, he is liable for their loss, though not arising from his negligence. *Oakes v. Northern Pac. R. Co.*, 20 Oregon 392, 47 Am. & Eng. R. Cas. 437. In *Railway Co. v. Shepard*, 8 Exch. 30, it is said that if articles are exposed, or packed in the shape of merchandise, "so that the company might have known what they were," and were received as luggage, the carrier would be liable for their loss.

But in Massachusetts it is held that the mere fact that the baggage-master of a carrier knows or has reason to believe that a trunk which he checks contains merchandise, will not suffice to make his principal liable for the merchandise as baggage; and that the carrier can only be bound, if at all, where there is a special agreement to the effect that the merchandise shall be considered as baggage. It may be inferred that even such a special agreement would not bind the carrier, for in *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322, the court said that there was no evidence "that the baggage-master had any authority to receive freight on a passenger train, or to bind the corporation to carry merchandise as personal baggage." See also *Alling v. Boston R. Co.*, 126 Mass. 121.

If valuable merchandise be deceitfully shipped as baggage the owner cannot recover for damage to it as freight. *Berley v. Newton*, 10 How. Pr. (N. Y.) 490; *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85; *Magnin v. Dinsmore*, 62 N. Y. 39; *Baldwin v. Liverpool Steamship Co.*, 74 N. Y. 130.

In *Norfolk R. Co. v. Irvine*, 84 Va. 553, it was held that a rule made by a railway company that only baggage containing wearing apparel of passengers should be carried on passenger trains was a reasonable one; and that one who was in the habit of carrying peddlers' wares as baggage, and who refused

to state that his trunk contained nothing but wearing apparel, had no cause of action for damages for refusal to carry it. A carrier may always refuse to carry merchandise, or articles of any kind, as baggage, when they are not within the legal definition of baggage. *The Ionic*, 6 Blatchf. (U. S.) 538; *Collins v. Boston R. Co.*, 10 Cush. (Mass.) 506; *Dibble v. Brown*, 12 Ga. 217; *Stinson v. Connecticut R. R. Co.*, 98 Mass. 83; *Merrill v. Grinnell*, 30 N. Y. 594. See note to *Blumenthal v. Marine R. Co.*, 79 Me. 350, 34 Am. & Eng. R. Cas. 247.

Where articles carried in a trunk are not properly baggage, and they are received by the carrier without notice, his liability is that of a bailee without reward. *Collins v. Boston R. Co.*, 10 Cush. (Mass.) 506; *Smith v. Boston R. Co.*, 44 N. H. 325.

The carrier is not bound to inquire as to the contents of a trunk or valise offered as baggage, as the passenger represents by implication that it contains no property not included within the legal definition of baggage. *Alling v. Boston R. Co.*, 126 Mass. 121; *Haines v. Chicago R. Co.*, 29 Minn. 160; *Michigan R. Co. v. Carrow*, 73 Ill. 348.

When the facts are undisputed, the question as to what is baggage is one for the court; otherwise it is for the jury, acting under proper instructions. *Kansas R. Co. v. Morrison*, 34 Kan. 502; *Connolly v. Warren*, 106 Mass. 146; *New York R. Co. v. F'raloff*, 100 U. S. 24; *Brock v. Gale*, 14 Fla. 523; *Grant v. Newton*, 1 E. D. Smith (N. Y.) 95; *Dibble v. Brown*, 12 Ga. 217; *Mauritz v. New York R. Co.*, 23 Fed. Rep. 765, 21 Am. & Eng. R. Cas. 286.

RESPONSIBILITY OF CARRIER WHERE BAGGAGE IS RETAINED IN THE CUSTODY OF THE PASSENGER.

This note is not intended to cover the liability of sleeping-car companies, that being a topic that merits a separate treatment.

The rule is undoubtedly established that where the passenger retains the exclusive custody of any article the carrier is not liable for its loss. The carrier cannot be held responsi-

ble for any article of which he has never in any sense had the custody. 2 *Redf. Railways* 38.

But it is often difficult to say what facts will show such exclusive custody on the part of the passenger. On this subject the courts are not quite agreed. *Hutch. Car.*, sec. 690, *et seq.*

In *Le Coteur v. London & S. W. R. Co.*, 6 B. & S. 961, 118 E. C. L. 961, a passenger went to a railway carriage, and there gave a chronometer to the railway porter, who placed it on a seat in the carriage. They both then went away; the passenger to look after his other luggage, and the porter to attend to his other duties. The former returned in a few minutes, and found that the chronometer had been stolen. The court held that the company was liable for the loss, the possession of the passenger not having been exclusive, but only partial.

In *Butcher v. London R. Co.*, 16 C. B. 13, the plaintiff carried with him on a railway journey a small carpet-sack. Arriving at the end of his journey, having got out on the platform, it was taken from him by a railway porter to be placed in one of the cabs standing at the station. The plaintiff never saw the bag again, and the porter could not find it. It was shown that it was the custom of the railway company to have their porters assist in transferring baggage from the coaches to cabs at its stations. The court held that there was evidence that the company had contracted to deliver the carpet-bag to the cab, and that whether the plaintiff had accepted a delivery on the platform was a question for the jury.

In *Richards v. London, B. & S. C. R. Co.*, 7 C. B. 839, 62 E. C. L. 839, a lady was travelling on a railway train, having with her a dressing-case, which the railway porters placed under her seat. On arriving at her destination the same porters took the dressing case for the purpose of placing it in a coach which was to take the lady to her residence; but it was not placed in the coach. The court held that the railway company was liable for the loss.

If the passenger places his baggage in the hands of a carrier for transportation, saying that he will accompany it, and he does not do so, and it is stolen, the carrier as an insurer will not have to answer for the loss. *Collins v. Boston & M.*

R. Co., 10 Cush. (Mass.) 506. Where the baggage is accompanied by some one else than the owner having an interest in it,—the owner's wife, for example,—the rule is different, and the carrier is not released; but the case is otherwise when the baggage is accompanied by a servant, or other person having no interest in it. *Curtis v. Delaware, L. & W. R. Co.*, 74 N. Y. 116. In *Beecher v. Great Eastern R. Co.*, L. R. 5 Q. B. 241, the plaintiff sent his baggage forward by a servant, following himself on a later train. It was held that the carrier received the baggage as that of the servant, and that unless it appeared that the carrier accepted it knowing that it belonged to the plaintiff the latter could not recover for its loss.

In *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44, a passenger got out of a railway coach for refreshments, leaving his portmanteau in the coach. On returning he failed to find his coach, and so got into another. At the end of his journey he recovered his portmanteau, but found that it had been rifled of a portion of its contents. It was held that the passenger had been guilty of contributory negligence in failing to take reasonable care of his baggage, and that the railway company was discharged.

In *Bergheim v. Great Eastern R. Co.*, 3 C. P. Div. 221, the porter of the railway company received the luggage of the plaintiff, and put it into the compartment which the plaintiff was to occupy, turning the key of the door. The plaintiff went to a refreshment-room, and on returning he found that one piece of his luggage was gone. It was held that the company was not liable; the court dissenting from the two previous cases last above cited, and holding that in such cases the carriers should only be held as bailees for hire, and hence liable for loss caused by negligence only.

But in *Bunch v. Great Western R. Co.*, 17 Q. B. Div. 215, 26 Am. & Eng. R. Cas. 137, a lady gave a bag which she intended to place in the carriage with her to a railway porter, asking him whether it would be safe to leave it with him, and he saying that it would. She then went to meet her husband, who was to purchase her ticket. On their return in about ten minutes the bag was missing. It was held that the railway was liable for the loss; and this ruling was sustained in the

House of Lords (13 App. Cas. H. of L. 31), all of the judges delivering opinions expressing dissatisfaction with the prior ruling in *Bergheim v. Great Eastern R. Co.*, 3 C. P. Div. 221.

Of course the main questions in this class of cases are, Was the custody of the passenger exclusive, and, if not so, was he guilty of contributory negligence? In considering these a reasonable latitude is allowed the passenger in keeping with him such articles of baggage as he may probably need during the journey, without absolving the carrier from his common-law liability.

A passenger on a steamboat on going to bed placed his watch, money, and a breastpin on a chair in his state-room, placing another chair and his baggage against the door, which had no lock or bolt; and these during the night were stolen. It was held that the owners of the steamboat were not liable for the loss. *Steamer Crystal Palace v. Vanderpool*, 16 B. Mon. (Ky.) 302.

A like ruling was made in *Clark v. Burns*, 118 Mass. 275, where the passenger's watch was stolen under similar circumstances, though by the regulations of the boat passengers were forbidden to fasten the doors of their state-rooms. The same rule was applied where the watch of a passenger was stolen from his pocket while he was asleep in his berth. *Abbott v. Bradstreet*, 55 Me. 530. So where a steerage passenger tied his trunk to his berth, and during the night it was stolen. *Cohen v. Frost*, 2 Duer (N. Y.) 335.

Where a lady dropped a handbag containing a large amount of money and jewelry out of a car window, it was held that she could not recover of the railway company, though the conductor of the train refused to stop the train to enable her to look for the handbag, but went on to the next station. *Henderson v. Louisville & N. R. Co.*, 20 Fed. Rep. 430, 16 Am. & Eng. R. Cas. 397, 123 U. S. 61, 31 Am. & Eng. R. Cas. 95. That was a clear case of contributory negligence.

A passenger asked for the key of his state-room, and was told that there was no key. He nevertheless put his valise in the room, asking some of the cabin boys at the time whether it would be safe. Going to another part of the boat he returned in about three quarters of an hour, and found that

his valise was gone. It was held that the carrier was not liable, though it was said by the court that the rule would have been otherwise if the state-room had been locked. *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85.

In *McKee v. Owen*, 15 Mich. 115, a lady passenger on a steamboat on going to bed placed her money rolled up in her dress on the upper berth of her state-room, and during the night it was stolen through a broken window. It was held by the lower court that the owner of the boat was not liable. On error the judgment was affirmed by an equally divided court. COOLEY and CHRISTIANCY, JJ., favoring a reversal, and CAMPBELL, J., and MARTIN, C.J., holding for an affirmance. In that case the question under consideration was discussed on either side with marked ability.

Where in a railway accident the agent of the plaintiff was killed, and money of the plaintiff on the person of the agent was burned, it was held that there could be no recovery for the money. *First National Bank v. Marietta & C. R. Co.*, 20 Ohio St. 259.

In *Weeks v. New York R. Co.*, 9 Hun (N. Y.) 669, 72 N. Y. 50, it appeared that the railroad company detached the engine from the car, and left it standing on the track until horses could be brought to move it to their depot, and that while the car was thus standing on the track, the plaintiff being a passenger therein, three men entered it, and robbed him of \$16,000 of government bonds which he had on his person. It was held that the company was not liable, the court of appeals holding that where a passenger carries valuables on his person, of which fact the carrier has no knowledge, and they are taken from him by robbers, the carrier, in the absence of gross negligence or fraud, is not liable, though negligent in his duty of protecting the passenger against violence.

In the case of *The R. E. Lee*, 2 Abb. 49, a lady having left some jewels in a sack hanging in her state-room they were stolen during a short time that she was absent from it. When she left the state-room, she closed the door. It was held that the carrier was not liable for the loss.

In *American Steamship Co. v. Bryan*, 83 Pa. St. 446, the valise of the plaintiff was stolen from his state-room while he

slept, he having left the door open for ventilation. He had no key to the door, but could have had one on application. The carrier was held not liable.

But the passenger may take ordinary baggage into his state-room for use during his journey without releasing the carrier from his common-law liability, if the passenger is free from any negligence that exposes it to loss. *Purvis v. Coleman*, 21 N. Y. 111; *Mudgett v. Steamboat Co.*, 1 Daly (N. Y.) 151.

In *Crozier v. Steamboat Co.*, 43 How. Pr. (N. Y.) 466, a plaintiff, being in a state-room, was robbed of his pocket-book in the night. The case was tried before Mr. JAMES C. CARTER, referee, who held that the plaintiff could recover. The referee said that the plaintiff was not required to "make a special deposit of his pocket money, or articles usually carried about his person before retiring to rest;" adding: "As well might we suppose that the passenger should deliver the clothes he takes off into the special custody of the carrier. . . . The rule of law applicable to such a case I think to be this: that if any of the articles or money which the passenger properly has with him in his state-room is stolen, the presumption is that the theft was in consequence of the default of the carrier; and that this presumption can be repelled only by proof that the loss was attributable to the negligence or fraud of the passenger, or to the act of God or the public enemy." This was affirmed on appeal. *Hutch. Car.* sec. 698, note 1. Mr. Hutchinson approves of this rule rather than of the doctrine laid down in *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, where the passenger could not lock his door because there was no key to it. *Hutch. Car.* sec. 699, note 1.

It will be seen that the cases are not in harmony. It would seem that the owners of a boat or ship who give a state-room having no lock or other fastening, or one with a window broken, to a passenger, thus exposing him to the ravages of thieves, hardly perform their duty. On the other hand the passenger who goes to bed in the place provided for him by the carrier, and the only place accessible to him, can hardly be said to have thereby contributed by his negligence to the loss. The following suggestion is made by CAMPBELL, J., in *McKee v.*

Owen, 15 Mich. 115: "But the fact that in these cases carriers must be at the mercy of travellers, who cannot usually be contradicted as to the extent of their losses, and may therefore recover what they see fit to swear to, renders some caution necessary against opening the door not unwarranted."

This remark would apply, however, equally as well to most cases where travellers make claims for baggage lost, and to many other cases where from the nature of the circumstances the plaintiff may know and be able to testify as to important facts not known to any one else. Besides, in the case then before the court, if the carrier had furnished a proper and secure place for the passenger to sleep in, there could have been no recovery on the facts otherwise presented, and the testimony of the plaintiff as to the extent of her loss could have availed her nothing. If the theory announced does not place the carrier in the power of the passenger, it appears to place the passenger very much in the power of the carrier.

In *Tower v. Utica R. Co.*, 7 Hill (N. Y.) 47, a railway passenger in getting off the train left his overcoat on the seat of the car which he occupied, and which proceeded on its journey. The overcoat was stolen. The court ordered a nonsuit. On appeal the judgment was affirmed on the grounds that the railway company never had possession of the overcoat, and that the negligence of the plaintiff conduced to the loss.

In *Del Valle v. Steamboat Richmond*, 27 La. Ann. 90, the officers of the boat seeming to have done their entire duty by the plaintiff, she was not allowed to recover for jewelry carried in a satchel stolen from her state-room. Negligence in the care of her jewels was also imputed to her by the court.

In *Hannibal R. Co. v. Swift*, 12 Wall. (U. S.) 262, military baggage and stores were being transported by railway, and they were guarded by troops to protect them against guerillas. In transit they were destroyed by fire, and the carrier was held to answer for the loss.

In cases where the passenger retains the partial custody of a part of his baggage, and the carrier is held responsible for its loss, the measure of damages only extends to the value of the passenger's clothing and personal ornaments, including a

watch, and such articles as are usually carried in the hand, with a reasonable sum of money to cover travelling expenses. *Wilson v. Baltimore R. Co.*, 32 Mo. App. 682.

It has sometimes been urged that the liabilities of carriers and inn-keepers in cases of this kind are identical. For a discussion of this question see opinions in *McKee v. Owen*, 15 Mich. 115, and *Laffray v. Grummond*, 74 Mich. 186.

Though a carrier is not responsible for baggage which a passenger keeps within his exclusive control, yet if its loss is occasioned by the negligence of the carrier, the carrier is liable; as where the servant of a carrier removes such baggage from one car to another, previous to its loss, without notice to the passenger. *Week v. N. Y. R. Co.*, 72 N. Y. 56; *Hillis v. Chicago R. Co.*, 72 Iowa 228, 31 Am. & Eng. R. Cas. 108; *First Nat. Bank v. Marietta R. Co.*, 20 Ohio St. 259; *American Steamship Co. v. Bryan*, 83 Pa. St. 446; *Thompson Carriers*, 518; *Kinsley v. Lake Shore R. Co.*, 125 Mass. 54; *Williams v. Keokuk R. Co.*, 3 Cent. L. J. 400.

CHECKS.

The possession of a check is evidence against the carrier of the receipt of the baggage which it designates. *Denver R. Co. v. South Park R. Co.*, 6 Col. 333, 18 Am. & Eng. R. Cas. 627; *Davis v. Michigan R. Co.*, 22 Ill. 278; *Atchison R. Co. v. Brewer*, 20 Kan. 669; *Louisville R. Co. v. Weaver*, 9 Lea (Tenn.) 38.

But the presumption is *prima facie* only, and may be rebutted. *Chicago R. Co. v. Clayton*, 78 Ill. 616.

When baggage after delivery to the carrier is lost, and there is no proof as to when or how it was lost, it will be presumed that it was lost through the negligence or fraud of the carrier. *Camden R. Co. v. Baldauf*, 16 Pa. St. 68; *Pennsylvania R. Co. v. Raiordan*, 119 Pa. St. 581; *Fairfax v. New York R. Co.*, 67 N. Y. 14; *Steers v. Liverpool R. Co.*, 57 N. Y. 1; *Claflin v. Meyer*, 75 N. Y. 262; *Burnell v. New York R. Co.*, 45 N. Y. 184. This rule applies both in a case of a partial as well as in a case of a total failure to deliver the baggage. *Canfield v. Baltimore & O.R. Co.*, 93 N. Y. 538, 16 Am. & Eng. R. Cas. 152.

The carrier is liable for baggage received for carriage, though no check be given for it, *Waldron v. Chicago & N. W. R. Co.*, 1 Dakota 336; also where it gives a check for baggage received, though the passenger has bought no ticket, *Matteson v. Railroad*, 76 N. Y. 381. In order to show the real contract between the passenger and the carrier both the ticket and the check may be considered. *Isaacson v. New York C. & H. R. R. Co.*, 94 N. Y. 278, 16 Am. & Eng. R. Cas. 188; *Milnor v. Railroad*, 53 N. Y. 363; *Railroad v. Copeland*, 24 Ill. 332; *Dill v. South Carolina R. Co.*, 7 Rich. (S. Car.) 158.

The check is not regarded as embodying the contract of carriage, but only as a voucher or token to enable the passenger to reclaim his baggage at the end of his journey. *Isaacson v. New York R. Co.*, 94 N. Y. 278, 16 Am. & Eng. R. Cas. 188; *Hickox v. Naugatuck R. Co.*, 31 Conn. 281.

Where a railway company received a passenger's check for baggage not yet received from another carrier, giving its own check in lieu thereof, and it appeared that it had surrendered the check so received to the other carrier, this was held to show that the baggage had been received by the railway company. *Chicago R. Co. v. Clayton*, 78 Ill. 616.

Where a passenger has delivered his baggage to a carrier, but has failed to receive a check through the fault of the latter, he may recover for the loss of the baggage, though a regulation of the carrier requires all baggage to be checked or booked. *Great Western R. Co. v. Goodman*, 12 C. B. 313; *Freeman v. Newton*, 3 E. D. Smith (N. Y.) 246; *Hickox v. Naugatuck R. Co.*, 31 Conn. 281.

The receipt of a check is not the only or even the best evidence of the delivery of baggage. *Thompson Carriers*, 514. But a check is admissible in evidence to show the nature of the carrier's contract. *Wilson v. Chesapeake R. Co.*, 21 Gratt. 654.

Possession of a check by the passenger, and evidence that carriers only give checks when fares have been paid and their baggage has been received, sufficiently proves receipt of baggage. *Davis v. Cayuga R. Co.*, 10 How Pr. 330. Possession of the carrier's check makes a *prima facie* case of receipt of baggage by the carrier. *Ahlbeck v. St. Paul R. Co.*, 39 Minn. 424; *St. Louis R. Co. v. Hawkins*, 39 Ill. App. 406.

WHEN THE RESPONSIBILITY OF THE CARRIER BEGINS.

The responsibility of the carrier as such for baggage begins from the time that it is unreservedly delivered to him for transportation. The delivery must be made to the carrier or to some agent of his authorized to receive it. *Brind v. Dale*, 8 C. & P. 207. Leaving baggage at the yard of an inn whence the vehicle of the carrier departs, will in the absence of special agreement or custom not suffice. *Buckman v. Levi*, 3 Camp. 414; *Selway v. Holloway*, 1 Ld. Raym. 46. Nor will the placing of the baggage in the carrier's vehicle without his knowledge. *Leigh v. Smith*, 1 C. & P. 638. And when a passenger gives baggage to the carrier with a request to retain it until he is ready to go, this will not be such a delivery as will bind the carrier as such. *Grosvenor v. New York Cent. R. Co.*, 39 N. Y. 34. But when one took a trunk to the baggage-room of a railway company and found it locked, and left it outside the door, went into the ticket office, and informed the ticket agent of the fact, who said "all right," it was held that as the ticket agent was apparently in charge of the depot, there was evidence showing a delivery, even if another agent had charge of the business of receiving freight. *Rogers v. Long Island R. Co.*, 2 Lans. (N. Y.) 269. A railway passenger is justified in regarding the man whom he sees handling the baggage at its station as the proper agent of the railway company for receiving baggage. *Ouimit v. Henshaw*, 35 Vt. 605.

A delivery, if accepted by the carrier, may be made at a place other than where such deliveries are usually made. *Phillips v. Earle*, 8 Pick. (Mass.) 182. But delivery to the driver of a coach not at the carrier's office was held bad, the driver having no authority thus to receive it. *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388. But the place of delivery may be varied by special agreement or by usage. *Hutch. Car. sec. 90*; *Green v. Milwaukee & St. P. R. Co.*, 38 Iowa, 100.

Where there is a custom that baggage for transportation shall be deposited at a particular place, and it appears that baggage was thus deposited, an acceptance by the carrier

may be inferred. *Merriam v. Hartford R. Co.*, 20 Conn. 354, 52 Am. Dec. 344. By course of business of the carrier he may be held bound as for the delivery of baggage, where it is deposited in the usual place for the reception of baggage, though no notice thereof is given to the carrier or his agent. *Minter v. Pacific R. Co.*, 41 Mo. 503; *Green v. Milwaukee R. Co.*, 38 Iowa, 100; *Najac v. Boston R. Co.*, 7 Allen (Mass.) 329; *Camden R. Co. v. Belknap*, 21 Wend. (N. Y.) 354. Voluntary assistance by the agents of the carrier in looking for lost baggage, or an offer by way of gratuity to pay on account of it, is not such evidence of delivery as will render the carrier liable for its loss. *Michigan R. Co. v. Meyers*, 21 Ill. 627. In *Forbes v. Davis*, 18 Tex. 268, the evidence showing that a passenger's trunk was placed on a steamboat a short time before her departure, and the passenger having recovered for its loss in the court below, the appellate court refused to reverse on the ground that the evidence was insufficient to show a delivery to the carrier. So where a portmanteau was left outside of the cabin of a steamboat, one of the employés saying that it would be safe there, the delivery was held sufficient. *Banquier v. Wilson*, 5 L. C. 203.

Where a passenger, intending to leave on an afternoon train, carried his trunk to the station in the forenoon, and was there told by the agent that it could not be checked until fifteen minutes before the starting of the train, whereupon the passenger left his trunk in the care of the agent, it was held that the delivery was complete from that time. *Hickox v. Nangatuck R. Co.*, 31 Conn. 281. So in all cases where the baggage is deposited at the proper place, with notice to the proper agent, the passenger intending to go by the next train or conveyance. *Camden Transp. Co. v. Belkamp*, 21 Wend. (N. Y.) 354. Where one who had engaged passage on a boat, but had not paid his fare, having placed his carpet bag on the boat, and then temporarily absented himself, during which time it was stolen, in consequence of which he did not proceed on his journey, he was allowed to recover for his loss. *Woods v. Devin*, 13 Ill. 746. But the rule is different where a passenger places his trunk in the designated place for trunks on a boat, not having engaged his passage, or given

any notice of an intention to do so, and it is stolen during his temporary absence. *Wright v. Caldwell*, 3 Mich. 51. Where a passenger entered a railway car just before the train started, left his valise on a vacant seat, and went out, it not appearing that any one was in charge of the train at that time, and on coming back soon afterward found that it was gone, it was held that there was no delivery. *Kerr v. Grand Trunk R. Co.*, 24 U. C. C. P. 209. So where a trunk containing a large sum of money was left by the owner in the care of the baggage-keeper of a boat, contrary to the advice and instruction of the captain of the boat, who said that the office was the proper place of deposit, the owner replying that he would take care of the trunk himself, it was held that there was no delivery. *Senecal v. Richelieu*, 15 L. C. Jur. 1.

In *Illinois R. Co. v. Troustine*, 64 Miss. 834, 31 Am. & Eng. R. Cas. 99, the owner left baggage with the defendant's baggage-master, with instructions to ship to a certain place the next day. This was on Friday, and the baggage, not having been shipped as directed, was consumed by fire on Sunday. It was held that the defendant was liable as a carrier. Of course this would not be so where baggage is left with the carrier with directions not to send it off until further orders, and before such orders are given a loss occurs. In such case the carrier is only held to the liability of a warehouseman, and not as an insurer. See note to *Illinois R. Co. v. Troustine*, 64 Miss. 834, 31 Am. & Eng. R. Cas. 99.

The plaintiff was a passenger on the railway train of the defendant. Having obtained a ticket, she delivered her baggage to one of the defendant's porters, and saw that it was properly labelled. On arriving at her destination one of her boxes was missing. By its charter the defendant had power to make by-laws which were to be printed on a board and hung up in its stations, the same to be binding on all parties. It had made a by-law, which provided that defendant was not to be responsible for baggage until it was booked and paid for, but it did not appear that it had been hung up as required; neither did it appear that the plaintiff had any knowledge of it. It was held that the defendant was liable for the loss. *Great Western R. Co. v. Goodman*, 16 Jur. 862.

The plaintiff was a passenger on the Fall River railway. When she arrived at the station the train had not come, and the baggage-master of the Fall River road was not there. Under such circumstances it was customary for passengers to give their baggage to the baggage-master of the Old Colony railroad, which used the same station, and she delivered it to the baggage-master of the Fall River road. The plaintiff having given her baggage under these circumstances to the baggage-master of the Old Colony railroad, the delivery was held to be complete as to the Fall River railway. *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69.

The liability of the carrier attaches when the baggage is received for transportation over any part of his line. *Logan v. Pontchartrain R. Co.*, 11 Rob. (La.) 24. And this though the passenger may not have paid his fare. *Woods v. Davies*, 13 Ill. 747; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.) 16.

Where the master of a steamboat was in the habit of carrying money on his own account for persons requesting him to do so, but always gratuitously, it was held that the delivery of money to him for carriage, he not holding himself out as the agent of the steamboat company, was not a delivery to the company, though it may have known that he was in the habit of acting in that manner. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.) 16, 5 Fed. Cas. 719. The fact of delivery is for the jury to determine, and circumstantial evidence for that purpose is admissible. *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460.

WHEN THE LIABILITY OF THE COMMON CARRIER OF BAGGAGE CEASES.

Baggage is supposed to travel with the passenger; immediate delivery when it arrives at its destination is the rule, and it is the duty of the passenger to call for it within a reasonable time. If he fails to do so, the liability of the carrier as an insurer ceases in respect of the baggage, and thenceforth he is liable only as a warehouseman. *Roth v. Buffalo R. Co.*, 34 N. Y. 548; *Burnell v. New York R. Co.*, 45 N. Y. 184;

Cary v. Cleveland R. Co., 29 Barb. (N. Y.) 35; *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray (Mass.) 271; *Hart v. Rensselaer & S. R. Co.*, 8 N. Y. 37; *Quimby v. Vanderbilt*, 17 N. J. L. 306; *Hoeger v. Chicago R. Co.*, 63 Wis. 100, 21 Am. & Eng. R. Cas. 308; *Mattison v. New York R. Co.*, 57 N. Y. 552; *Ross v. Missouri R. Co.*, 4 Mo. App. 582; *Galveston R. Co. v. Smith*, 81 Tex. 479; *Fairfax v. New York R. Co.*, 67 N. Y. 11; *Chicago R. Co. v. Fairclough*, 52 Ill. 106; *Whitney v. Chicago & N. W. R. Co.*, 27 Wis. 327; *Rome R. Co. v. Wimberly*, 75 Ga. 316; *Hutch. Car.* sec. 712.

In Massachusetts the rule is different, the court holding that where the passenger fails to call for his baggage in a reasonable time the carrier is only a gratuitous bailee. A passenger arrived at a station in the evening, but left his baggage in the baggage-room of the railway depot. During the night the depot and the baggage-room were consumed by fire. The court held that the railway company was a gratuitous bailee, and hence that its failure to provide a suitable storeroom with reference to security against fire, and proper means for putting out a fire, was not of itself such gross negligence as to make it liable for loss occurring from accidental fire. *Clark v. Eastern R. Co.*, 139 Mass. 423, 21 Am. & Eng. R. Cas. 307. In *Burnell v. New York R. Co.*, 45 N. Y. 184, this view was presented in argument, but the court held that the carrier's contract covered the storage of baggage after a reasonable time for its removal had elapsed, and that he was not a gratuitous bailee.

No authorities are cited to sustain the doctrine announced in Massachusetts, and there are none that we find to support it.

The decisions of the courts relative to the delivery of goods by carriers are pertinent to the present inquiry, since the duty of the carrier in the transportation of baggage is usually the same as in the case of merchandise (*Montgomery R. Co. v. Culver*, 75 Ala. 587, 22 Am. & Eng. R. Cas. 411), but this note is limited to cases decided in suits for loss of or damage to baggage. In one important respect, however, there is a difference. As a passenger usually arrives at his destination at the same time that his baggage arrives, he can in general

remove it shortly thereafter; hence it is held that a "reasonable" time for its removal is not the same as that allowed for the removal of freight. *Hutch. Carr.* sec. 708; *Quimit v. Henshaw*, 35 Vt. 605.

A warehouseman is only bound to take common and reasonable care of a commodity entrusted to his charge. *Sto. Bailm.* sec. 444. And such is the obligation of a carrier in respect of baggage that has not been called for within a reasonable time. *Van Horne v. Kermit*, 4 E. D. Smith (N. Y.) 453.

In case of non-delivery or delivery in bad order by the carrier it sometimes becomes necessary to determine whether the carrier ever held the baggage as a common carrier or as a warehouseman.

A regulation of a railway company that it will only deliver baggage at one of its five stations in a city is unreasonable and void. *Pittsburg R. Co. v. Lyon*, 123 Pa. St. 140, 37 Am. & Eng. R. Cas. 231.

A passenger should call for his baggage immediately on his arrival and the transfer of the baggage to the platform, making due allowance for the delay and confusion caused by the arrival and departure of trains, and the crowd that is usually about the platform. *Chicago R. Co. v. Addizoat*, 17 Ill. App. 632.

The fact that a passenger arrives at his destination on Sunday, during which secular labor is forbidden by law, will not excuse him for not calling for his baggage until Monday. *Jones v. Norwich Transp. Co.*, 50 Barb. (N. Y.) 193. Nor will it excuse the carrier for failing to deliver it. *Stallard v. Great Western R. Co.*, 2 B. & S. 420, 110 E. C. L. 419.

If a passenger has notice of reasonable regulations of the carrier as to the manner of delivering baggage, he is bound by them, though he may not directly assent thereto. *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85.

The custom of a carrier of keeping open an office for the delivery of baggage only during certain hours of the day will not bind a passenger unless he is informed of it. *Stallard v. Great Western R. Co.*, 2 B. & S. 419, 110 E. C. L. 419.

The carrier must not only deliver the baggage to the passenger, but he must deliver it in as good order as when received;

and proof that it was in good order when received and in a damaged condition when delivered casts on him the burden of showing that the damage was occasioned by some cause exempting the carrier from liability for safe delivery. *Montgomery R. Co. v. Culver*, 75 Ala. 587, 22 Am. & Eng. R. Cas. 411; *Roth v. Buffalo R. Co.*, 34 N. Y. 548. *Contra*, *Wald v. Louisville R. Co.*, 92 Ky. 645, 58 Am. & Eng. R. Cas. 123.

If the passenger does not call for his baggage on arrival, the carrier cannot leave it uncared for, or abandon it. *Matteson v. New York R. Co.*, 76 N. Y. 381.

In *Texas & Pac. R. Co. v. Cupps*, (Tex.) 16 Am. & Eng. R. Cas. 118, the court say that if a station-master of a railway company consents to hold the baggage of a passenger beyond the usual time for delivery the liability of the carrier as such will continue during the time that the baggage is thus held. This view is not supported by the reported cases. *Hoeger v. Chicago R. Co.*, 63 Wis. 100, 21 Am. & Eng. R. Cas. 308.

A lady left a trunk at a depot until called for, and it was held that the liability of the carrier was at most only that of a gratuitous bailee. *Little Rock R. Co. v. Hunter*, 42 Ark., 200, 18 Am. & Eng. R. Cas. 527.

Where a lady's trunk arrived in the evening and was left overnight in the ladies' waiting-room, where it was broken open and the contents were stolen, it was held that the carrier was liable as a common carrier for the loss, *St. Louis R. Co. v. Hardway*, 17 Ill. App. 321; but in a like case it was ruled differently in Massachusetts, *Clark v. Eastern R. Co.*, 139 Mass. 423, 21 Am. & Eng. R. Cas. 307.

Where a lady travelling alone, owing to a detention of the train, did not arrive at her destination until late at night, and, a number of trains arriving at the same time, there was an unusual crowd of passengers, and much delay in delivering baggage, it was held that she was not bound to call for her baggage during that night, and that it having been destroyed by accidental fire during the night, the carrier was liable. *Cary v. Cleveland R. Co.*, 29 Barb. (N. Y.) 35.

In determining what is a reasonable time the custom of the carrier, the manner of taking the baggage away from the sta-

tion, and all the circumstances of the case are to be considered. *Mote v. Chicago R. Co.*, 27 Iowa 22.

The question is often one for the jury, acting under the direction of the court; and the general rule as to liability is sometimes qualified by the action of the agents of the carrier, such as the baggage-master. We have already seen that the carrier is bound by the acts of the baggage-master acting within the scope of his authority. *McCormick v. Pennsylvania R. Co.*, 49 N. Y. 303. Thus the act of the latter in forwarding the baggage against the objection of the passenger may amount to a conversion, and may absolve the passenger from the ordinary duty of calling for it promptly after its arrival at the place of destination. *Id.* So if the carrier transports the baggage beyond the destination of the passenger, and there stores it, his liability as insurer is not thereby terminated. *Toledo R. Co. v. Hammond*, 33 Ind. 379. The carrier is bound as such to carry the baggage to the place of destination, and also to deliver it there in a reasonable time, and in a reasonable manner. *Cary v. Cleveland R. Co.*, 29 Barb. (N. Y.) 35; *Logan v. Pontchartrain R. Co.*, 11 Rob. (La.) 24. And if the baggage is not delivered to the passenger it must be placed in a secure baggage-room or warehouse. *Bartholomew v. St. Louis R. Co.*, 52 Ill. 227; *Chicago R. Co. v. Fairclough*, 52 Ill. 106; *Norway Plains Co. v. Boston R. Co.*, 1 Gray (Mass.) 263, 61 Am. Dec. 423.

And it is not until the baggage is stored in a suitable place that the liability of the carrier ceases, and that of the warehouseman attaches. *Mote v. Chicago R. Co.*, 27 Iowa 22.

A carrier transporting baggage free is only held to the responsibility of a gratuitous bailee. *Flint R. Co. v. Weir*, 37 Mich. 111; *Rice v. Illinois R. Co.*, 22 Ill. App. 643.

The burden of showing delivery of baggage is upon the carrier, and transportation of it to the place of delivery is not sufficient to discharge him from responsibility. *Matteson v. New York R. Co.*, 76 N. Y. 381.

In New York it is held that where the carrier's liability is only that of a warehouseman, in case of loss he must show that the loss was without his fault. *Fairfax v. New York R. Co.*, 73 N. Y. 167; *Curtis v. Delaware R. Co.*, 74 N. Y. 116.

Where the agents of a carrier agree that baggage arriving in the evening may remain in the baggage-room until the next morning, it remains during that time at the risk of the carrier. *Burget v. New York R. Co.*, 23 N. Y. Supp. 415; *Curtis v. Avon R. Co.*, 49 Barb. (N. Y.) 148.

Where a passenger calls for his baggage in a reasonable time, and the agent of the carrier in charge of the baggage tells him to call again, and when he calls again during the same day, and is told by the agent that further search has been made, and that the baggage cannot be found, the acts and declarations of the agent are competent evidence for the passenger in a suit by him against the carrier for the loss of the baggage. *Baltimore R. Co. v. Campbell*, 36 Ohio St. 647, 3 Am. & Eng. R. Cas. 246.

Where a passenger on arriving at her destination asked the baggage-master to keep her trunk for a few days, who told her that he had no power to keep baggage with checks on, but that if she gave up her check her trunk would be perfectly safe, and she surrendered the check, and left the baggage with him, and it was afterwards delivered to one who falsely claimed it, the court held that the carrier was not liable for the loss in the absence of any showing that the baggage-master had power to make such new agreement. *Mattison v. New York C. & H. R. R. Co.*, 57 N. Y. 552. But on a second appeal it was held that the question as to the delivery of the baggage was for the jury. *Matteson v. New York Cent. & H. R. R. Co.*, 76 N. Y. 381. The facts as they appeared on the second appeal were slightly different from what they were on the first.

If after delivery the passenger asks the baggage-master to keep his baggage till called for, the bailment is gratuitous, and the carrier is only liable for gross negligence. *Minor v. Chicago R. Co.*, 19 Wis. 40.

A passenger arrived on a steamboat at one o'clock in the morning, which she left at eight or nine o'clock of the same morning. Early that morning her baggage was placed in a warehouse, and was there destroyed by an accidental fire that afternoon. It was held that the carrier was not liable for the loss. *Jones v. Norwich Transp. Co.*, 50 Barb. (N. Y.) 193.

Reasonable time for taking baggage away will not be extended by illness of the passenger. *Chicago R. Co. v. Boyce*, 73 Ill. 510. And this though the carrier may have given him a lay-over ticket on account of his illness. *Id.*

In the absence of a custom not to deliver baggage when trains arrive at a late hour at night, the lateness of the hour of arrival will not excuse the passenger for not calling at once for his baggage. *Ouimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646.

The course of business of the carrier is of essential importance in determining when the transit ends. *Id.*; *Hooper v. Chicago R. Co.*, 27 Wis. 92. Thus where it is the usage of a railway company for the porters of the company to put the luggage on a cab, there is no complete delivery to the passenger until that is done, though the porter take the baggage from his hands while he is standing on the platform in order to put it on a cab. *Richards v. London R. Co.*, 7 C. B. 839; *Butcher v. London R. Co.*, 16 C. B. 13; *Ouimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646.

The reasonable time for the removal of baggage begins from the time of its arrival, and not from the time of the arrival of a passenger who has stopped over in accordance with a privilege conceded by custom. *Chicago R. Co. v. Boyce*, 73 Ill. 510.

In Illinois it is held that the responsibility of the carrier as warehouseman does not begin until the baggage has been safely stored. *Bartholomew v. St. Louis R. Co.*, 53 Ill. 227; *Chicago, etc., R. Co. v. Fairclough*, 52 Ill. 106; *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510. See extended note to *Hoeger v. Chicago R. Co.*, 63 Wis. 100, 21 Am. & Eng. R. Cas. 308.

Where the passenger arrived at 8.30 p.m. and did not call for his baggage until 9 or 10 the next morning, it was held the demand was not made within a reasonable time. *Jacobs v. Tutt*, 33 Fed. Rep. 412; *Ross v. Missouri, K. & T. R. Co.*, 4 Mo. App. 582.

Where a steamer, having been delayed about twelve hours, arrived at nine o'clock at night, and, there being no hacks or conveyances at the wharf, a lady passenger was permitted by the captain of the vessel to stay on the steamer all night,

during which it and her baggage were consumed by an accidental fire, it was held that as to her the voyage did not end until she had a reasonable time to leave the vessel the next morning, and that this applied not only to the passenger, but also to her baggage. *Prickett v. New Orleans Line*, 13 Mo. App. 436.

Baggage arriving at 6 o'clock P.M., a demand for it at 7 o'clock A.M. of the next day was held to be reasonable. *Burgevin v. New York R. Co.*, 23 N. Y. Supp. 415. *Contra*, *Vineburg v. Grand Trunk R. Co.*, 13 Ont. App. Rep. 93, 27 Am. & Eng. R. Cas. 271.

A delay of twenty-four hours was held to discharge the carrier from liability as an insurer in *Holdridge v. Utica R. Co.*, 56 Barb. (N. Y.) 191. So where the passenger for his own convenience leaves his baggage at a station overnight. *Ross v. Missouri R. Co.*, 4 Mo. App. 582.

A steamship passenger bound for New York, being ill, left the ship at the quarantine station some distance from the city, leaving his baggage on the ship; and it was held that in the absence of any offer by the vessel to deliver the baggage at the quarantine station, it was bound to carry it to New York, and deliver it there. *Gilhooly v. New York Nav. Co.*, 1 Daly (N. Y.) 197.

Where one had taken passage for the "Port of New York" and was landed with his baggage at Jersey City, opposite New York City, and his baggage was accidentally lost between these two places, it was held that the carrier was not liable for the loss. *Klein v. Hamburg-American Packet Co.*, 3 Daly (N. Y.) 390.

There may be cases, however, where the liability of a carrier having terminated he will not be liable even as a warehouseman. Thus where the baggage of a passenger has been actually delivered to him at his destination, and he, for his own convenience, delivers it to the baggage-master to be kept until sent for, the carrier after that is only liable for gross negligence as a gratuitous bailee. *Minor v. Chicago R. Co.*, 19 Wis. 40; *Chicago R. Co. v. Boyce*, 73 Ill. 510.

But in *Powell v. Myers*, 26 Wend. (N. Y.) 591, the plaintiff took passage on a steamboat from West Point for New York,

where he arrived between nine and ten at night. Passengers in such cases sometimes stayed on the boat till morning. Soon after arriving at New York the plaintiff asked the master of the boat if his baggage would be safe on board the boat during the night, and the latter answered that it would be perfectly safe, as a watchman was stationed for its protection till morning. The plaintiff went off to the city, leaving his baggage on the boat. During the night a negro produced a forged order for the baggage and received it. Chancellor WALWORTH in delivering the opinion said: "The jury were right in concluding that the baggage left on board was in the custody of the master in his capacity of common carrier until it was called for at the usual time in the morning after its arrival at its place of destination."

The non-delivery of baggage on demand raises a presumption of negligence, which the warehouseman is bound to remove by proof showing that sufficient ordinary care was used by him, and that its loss was not caused by want of proper care and diligence on his part. *Fairfax v. New York R. Co.*, 43 N. Y. Super. Ct. 18.

Where at the end of an ocean voyage the steamship company did not produce the plaintiff's baggage which it had received, or account for it, the court held that the evidence was sufficient to sustain a finding by a jury of gross negligence. *Steers v. Liverpool Steamship Co.*, 57 N. Y. 1.

Where one carrier, having received baggage from a passenger for transportation over a series of connecting lines, delivered it to the wrong carrier, who carried it forward to its proper destination, where it was called for by the passenger within a reasonable time, but could not be found, it was held that the last carrier receiving the baggage, under these circumstances, was liable for the loss; the court holding that it was either acting wrongfully in receiving the baggage, or that it had voluntarily assumed the duties of a common carrier. *Fairfax v. New York C. & H. R. R. Co.*, 37 N. Y. Super. Ct. Rep. 516; s. c. 40 N. Y. Super. Ct. Rep. 128, and 43 N. Y. Super. Ct. Rep. 18, 67 N. Y. 11, and 73 N. Y. 167.

The liability of a carrier as an insurer ceases when the

baggage is deposited in a warehouse. *Butler v. East Tennessee R. Co.*, 8 Lea (Tenn.) 32, 9 Am. & Eng. R. Cas. 249.

It is not required that a carrier shall keep a night watch about a warehouse, or to have some one to sleep in it, where the average amount of goods stored in it does not exceed \$500. *Pike v. Chicago R. Co.*, 40 Wis. 583.

Where a carrier retains baggage of a passenger under his lien for fare, and articles are taken therefrom while it is in his possession, he is liable for its loss. *Southwestern R. Co. v. Bentley*, 51 Ga. 311.

Where baggage was stored by a carrier in a building insecurely fastened, and without a watchman, and was stolen therefrom, the carrier was held liable for the loss. *Mote v. Chicago R. Co.*, 27 Iowa 22.

But the fact that the depot in which baggage is placed is made of pine timber is not evidence of negligence, the depot being in a small town, and not exposed to unusual danger from fire. *Wald v. Louisville R. Co.*, 92 Ky. 645, 58 Am. & Eng. R. Cas. 123.

Carriers are liable as common carriers for baggage until the baggage is ready to be delivered to the passenger at his place of destination, and until he has had a reasonable opportunity for receiving it and removing it. *Louisville R. Co. v. Mahan*, 8 Bush (Ky.) 184. In the case cited the passenger arrived at his destination at 8.30 p.m. He left his baggage in the custody of the agent of the company, and during that night the baggage was destroyed by fire. The court held that the carrier was only liable as a warehouseman.

Where baggage was delivered to a lady passenger at the end of her journey, and she left it with the railway porter, who said that he would take care of it, and it was lost, the court held that the carrier was not liable, the porter having no power to bind the carrier in that way. The court said: "Possibly the porter may be responsible for the loss; but the company clearly are not." *Hodkinson v. London R. Co.*, 14 Q. B. Div. 228.

Where a passenger, being unable to procure his baggage immediately, went on by the first train, the agent of the carrier agreeing to send it by the next train, it was held that

in transporting the baggage by the next train the carrier was responsible for theft during the transit as a common carrier, and not as a warehouseman. *Warner v. Burlington & M. R. Co.*, 22 Iowa 166. But if no such agreement is made, and the carrier forwards the baggage by a later train, it is considered as freight, and the carrier may charge for it accordingly. *Wilson v. Grand Trunk R. Co.*, 57 Me. 138; *Graffam v. Boston & M. R. Co.*, 67 Me. 234.

Where the baggage-master of a carrier agrees with a passenger to forward his baggage by the next train, and does so, and after its arrival at its destination it is broken open by thieves, the carrier is liable as warehouseman. *Warner v. Burlington & M. R. Co.*, 22 Iowa 166.

The liability of the carrier as such does not cease until a reasonable time has been allowed the passenger to call for it. *Patscheider v. Great Western R. Co.*, L. R. 3 Exch. Div. 153, 31 Moak Rep. 195. The carrier is liable for baggage according to the law of the place where it should be delivered, and cannot be exonerated by restricted liability created by the law of the place where it was received. *Curtis v. Delaware R. Co.*, 74 N. Y. 116.

The question as to delivery is, as we have seen, usually one for the jury, but where the facts are undisputed it is one for the court. *Roth v. Buffalo*, 34 N. Y. 548; *Louisville R. Co. v. Collins*, 2 Duv. (Ky.) 114; *Chicago R. Co. v. Boyce*, 73 Ill. 510.

In the case of ships "according to the established usage of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." *Hyde v. Trent Navigation Co.*, 5 T. R. 397; *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray (Mass.) 263, 61 Am. Dec. 423.

Where a passenger waited after arriving at her destination for fifteen minutes to receive her baggage, the baggage-master being absent, and then went away, and sent her son three hours afterwards for it, and he on arriving at the depot found the baggage-master still absent, but finally found him, delivered his check, and received the baggage, and in the meantime the conveyance that he had employed to remove it had gone, and being unable to procure another, he left the

baggage with the baggage-master for the night, and during the night the contents of the baggage were stolen, it was held that the liability of the carrier as insurer had not terminated. *Dininny v. New York R. Co.*, 49 N. Y. 546.

But where a passenger on arriving at his destination left his valise in the open depot where baggage was usually kept during the day, in charge of a servant of the carrier, and did not present his check or call for it for twenty-four hours afterwards, it was held that he was guilty of negligence, and that the carrier was not liable for the loss of the valise in the meantime by theft. *Holdridge v. Utica R. Co.*, 56 Barb. (N. Y.) 191.

So where the carrier delivers the wrong trunk to the agent of the passenger, and on its return to him the trunk owned by the passenger cannot be found, the carrier is liable for its loss. *Texas R. Co. v. Cook*, 2 Texas App. (Civ. Cas.) 576.

It is not negligence for a passenger to go to his hotel near by and then to send back within a reasonable time for his baggage. *Nevins v. Bay State Steamboat Co.* 4 Bosw. (N. Y.) 225.

Where baggage arrived at 10 o'clock, A.M., and was not called for until next morning when it was destroyed by fire, the court held that the carrier was not liable as a common carrier. *Hogan v. Grand Trunk R. Co.* 2 Quebec L. R. 142.

The plaintiff was going by railway from Burlington to East Dorset. From Burlington to Rutland he would go by the Rutland & Burlington Railroad (the defendants' company); from Rutland to East Dorset by the Western Vermont Railroad. It did not appear that these roads formed a continuous and connected line. The plaintiff had his box marked for Rutland, and paid for his passage only to Rutland. He arrived at Rutland at half-past eleven at night. His box was put upon the platform, and the man who handled and took charge of the baggage there put the box, with other boxes and trunks, on a wheelbarrow. The plaintiff asked the man at what hour in the morning the cars would go to East Dorset. He replied, "At half-past five o'clock." The plaintiff then asked the man if his box would be safe till morning. The reply was, "It will be safe." The man then started with

the wheelbarrow, and went to a baggage-room in the depot, into which he put the box and other baggage, and locked up the room. In the morning, at about five o'clock, the plaintiff called for his box, and it could not be found, the baggage-master saying that it had probably been taken on the four o'clock train that had left Rutland that morning for Bellows Falls. It was held that the defendant was liable as a common carrier for the loss of the baggage. *Quimit v. Henshaw*, 35 Vt. 605, 84 Am. Dec. 646.

LIABILITY OF CONNECTING CARRIERS FOR LOSS OF BAGGAGE.

On this subject the decisions are in a state of hopeless confusion. See remarks of the court on this subject in *Nashua Lock Co. v. Railroad Co.*, 48 N. H. 346.

Passengers in going on a long journey often pass over the lines of several carriers. In such cases they commonly buy from the first carrier what is called a through or coupon ticket, showing a right of transportation to their ultimate destination, to which point their baggage is also checked. In such case the first carrier receives pay for the whole journey, which is divided at stated periods by some conventional rule between the carriers of the various lines. The arrangement is convenient for the passenger, since it saves him time, trouble, and expense; it is also beneficial to the carriers for the same reasons, and because it enables them to increase their patronage.

A connecting carrier is one whose route, not being the first one, lies somewhere between the point of shipment and the point of destination. *Nanson v. Jacob*, 12 Mo. App. 125.

Connecting carriers are considered in England as the agents of the first carrier, which thus becomes responsible for their negligence or wrong-doing in the transportation of baggage. In case of loss of baggage on the line of a connecting carrier the passenger cannot sue such connecting carrier on contract for want of privity. His only remedy on contract is against the first carrier. This rule is known as the rule in *Muschamp's case*. *Muschamp v. Lancaster R. Co.*, 8 M. & W. 421; *Watson v. Railway*, 15 Jur. 48; *Webber v. Railway*, 3 H.

& C. 771. For a full review of the English and American cases on this subject see *Gray v. Jackson*, 51 N. H. 9, 12 Am. Dec. 1.

The English rule, to the extent of holding the first carrier liable for losses occurring on connecting lines, has been followed by some of the American courts. *Mobile R. Co. v. Copeland*, 63 Ala. 219; *Weed v. Railroad*, 19 Wend. (N. Y.) 534; *Carter v. Peck*, 4 Sneed (Tenn.) 203; *Louisville R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44; *Angle v. Railroad*, 9 Iowa 478; *Bennet v. Filyaw*, 1 Fla. 403; *Bradford v. Railroad*, 7 Rich. (S. Car.) 201; *Mosher v. Southern Express Co.*, 38 Ga. 37; *Falvey v. Railroad Co.*, 79 Ga. 597; *Pereira v. Railroad*, 66 Cal. 92, 18 Am. & Eng. R. Cas. 565; *Hulliday v. Railway Co.*, 74 Mo. 159, 6 Am. & Eng. R. Cas. 433; *Baltimore R. Co. v. Campbell*, 36 Ohio St. 647, 3 Am. & Eng. R. Cas. 246; *Illinois Central R. Co. v. Copeland*, 24 Ill. 332; *Furstenheim v. Memphis R. Co.*, 9 Heisk. (Tenn.) 238.

The English rule is not, however, followed in most of the states. The majority of our courts hold that in the absence of a contract, express or implied, the obligation of the first carrier only extends to the transportation to the end of his line, and a delivery to the next succeeding carrier; and that the mere issuing of a through ticket, and checking baggage through to ultimate destination, implies no extension of responsibility beyond the limit of the line of the receiving carrier. *Nutling v. Railroad*, 1 Gray (Mass.) 502; *Darling v. Railroad*, 11 Allen 245; *Harris v. Railway Co.*, 15 R. I. 371, 26 Am. & Eng. R. Cas. 323; *Knight v. Railroad Co.*, 13 R. I. 572; *Hunter v. Railway Co.*, 76 Tex. 195, 42 Am. & Eng. R. Cas. 501; *Grover v. Railway Co.*, 70 Mo. 672; *McConnell v. Railroad Co.*, 86 Va. 248, 40 Am. & Eng. R. Cas. 155; *Clyde v. Hubbard*, 88 Pa. St. 358, *Hill v. Railroad Co.*, 86 Va. 248; *Hill v. Railroad Co.*, 60 Iowa, 196, 9 Am. & Eng. R. Cas. 21; *Rickerson v. Railroad Co.*, 67 Mich. 110, 32 Am. & Eng. R. Cas. 487; *Detroit R. Co. v. McKenzie*, 43 Mich. 609; *Myrick v. Railroad Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; *Savannah R. Co. v. Harris*, 26 Fla. 148, 42 Am. & Eng. R. Cas. 457; *Condict v. Railroad*, 54 N. Y. 502; *Root v. Railroad*, 45 N. Y. 524; *Irish v. Railroad*, 19 Minn. 376; *Camden R. Co. v.*

Forsyth, 61 Pa. St. 81; *Crawford v. Railroad*, 51 Miss. 222; *Farmers' Bank v. Transportation Co.*, 23 Vt. 186; *Railroad Co. v. Mansf. Co.*, 16 Wall. 318; *Railroad Co. v. Pratt*, 22 Wall. 123; *Van Santvoord v. St. John*, 6 Hill 158; *Phillips v. Railroad*, 78 N. Car. 294; *Gray v. Jackson*, 51 N. H. 9, 12 Am. Dec. 1; *Brintnall v. Railroad*, 32 Vt. 665; *McMillan v. Railroad*, 16 Mich. 120; *Burroughs v. Railroad*, 100 Mass. 126; *Baltimore R. Co. v. Schumaker*, 29 Md. 176; *Hadd v. Express Co.*, 52 Vt. 335, 6 Am. & Eng. R. Cas. 443, Hutch. Carr. sec. 149; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *Myrick v. Michigan R. Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; *Insurance Co. v. Railroad Co.*, 104 U. S. 157, 3 Am. & Eng. R. Cas. 260; *Central Trust Co. v. Wabash R. Co.*, 31 Fed. Rep. 247; *Elmore v. Naugatuck R. Co.*, 23 Conn. 457; *Knights v. Portland R. Co.*, 56 Me. 234; *Milnor v. New York R. Co.*, 53 N. Y. 364; *Pennsylvania R. Co. v. Swartzenberger*, 45 Pa. St. 208; *Burroughs v. Norwich R. Co.*, 100 Mass. 26; *Knight v. Providence R. Co.*, 13 R. I. 572, 9 Am. & Eng. R. Cas. 90; *Hadd v. U. S. Express Co.*, 52 Vt. 335, 6 Am. & Eng. R. Cas. 443; *Myrick v. Railroad*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; *Fendergast v. Adams Express Co.*, 101 Mass. 120; *American Ex. Co. v. Second National Bank*, 69 Pa. St. 394; *Inhabitants v. Hall*, 61 Me. 517; *Detroit R. Co. v. McKenzie*, 43 Mich. 609; *Rickerson Co. v. Railroad Co.*, 67 Mich. 110, 32 Am. & Eng. R. Cas. 487; *Mobile R. Co. v. Hopkins*, 41 Ala. 486.

The most of these authorities relate to contracts for the carriage of goods; but the principles involved apply to the carriage of baggage as well. The difference between the doctrine of the English courts and that held by the most of the American courts grows merely out of different conclusions drawn from the same state of facts, the English courts inferring a contract from evidence from which the American courts make no such implication; or, as was said by SIMPSON, C.J., in *Piedmont Mfg. Co. v. Railroad*, 19 S. Car. 353:

“There is really no great difference between the English and American doctrine on this subject. The one holds that to exempt a carrier from liability beyond its terminus there must be a special contract to that end. The other, that to make the first carrier responsible there must be a special

contract to that end. Both admit that the carrier is not bound to go beyond the terminus [of his line], but that he may do so; and if he undertakes to do so he is bound by his undertaking. In the one case, if the contract contains an exemption, it is absolute; in the other, if conditions are specified they must govern. This is nothing more than saying that the whole thing is per contract; and that whatever the contract is, that must be enforced; the legal construction being that in the one case, in the absence of exemptions, the carrier has contracted unconditionally to deliver; the other with conditions inserted they must control."

Outside of the state of Georgia it was never held in this country, as it was in England, that the remedy of the passenger is exclusively against the first carrier; and the Georgia rule has now been changed by statute. *Ga. Code*, sec. 2084; *Western R. Co. v. Cotton Mills*, 81 Ga. 522, 35 Am. & Eng. R. Cas. 602; *Hawley v. Screven*, 62 Ga. 347. Hence the rule is now universal in this country that the carrier actually in fault may be sued by the passenger, even though the first carrier may also be liable by its contract. *Packard v. Taylor*, 35 Ark. 402; *International R. Co. v. Tisdale*, 74 Tex. 8; *Illinois R. Co. v. Cowles*, 32 Ill. 116; *Barter v. Wheeler*, 49 N. H. 9; *Southern Express Co. v. Hess*, 53 Ala. 19; *Halliday v. Railway Co.*, 74 Mo. 159, 6 Am. & Eng. R. Cas. 433; *Schopman v. Boston R. Co.*, 9 Cush. (Mass.) 24; *Chicago R. Co. v. Fahey*, 52 Ill. 81; *Glasco v. New York R. Co.*, 36 Barb. 557; *Johnson v. West Chester R. Co.*, 70 Pa. St. 367; *Atchison R. Co. v. Rouch*, 35 Kan. 740, 27 Am. & Eng. R. Cas. 257; *Louisville R. Co. v. Weaver*, 9 Lea (Tenn.) 38, 16 Am. & Eng. R. Cas. 218.

So in England it is now held, that where there is a sale of a through ticket, and there is a loss of baggage by a connecting carrier, such carrier, though not liable on contract, may in case of negligence be sued in tort. *Hooper v. London R. Co.*, 5 L. J. Q. B. D. 103, overruling *Mylton v. Midland R. Co.*, 4 H. & N. 615.

In favor of the English doctrine, known as the Rule in Muschamp's Case, it is said that while a passenger when injured in his person will know on what line the injury occurred, he will probably not know on what line his trunk was damaged

or lost; and hence that public policy requires that the law shall hold the initial carrier liable for any loss or damage to baggage sustained anywhere during its continuous transit. A like course of reasoning has inclined some of the courts to hold the last carrier liable, leaving it to him to find out where the loss occurred, and giving him a right of action over against the real delinquent. An answer to this line of argument is that, however convenient for the passenger these rules may be, there can be no justice in punishing one carrier for the fault of another. So none of the rules here mentioned is found to be entirely satisfactory.

In *Louisiana R. Co. v. Weaver*, 9 Lea (Tenn.) 38, 16 Am. & Eng. R. Cas. 218, the court say that the weight of American authority is that where the initial carrier sells coupon tickets over connecting lines, receiving fares for the whole distance, it is not liable for the carriage of the passenger beyond its line; each ticket, without regard to form, being considered as the separate contract of the carrier over whose route it entitles the holder to be carried. However, the court held that the same rule should not apply to baggage. "The reason," the court said, "is obvious. There can never be any doubt as to the carrier by whose fault the passenger is injured, or the personal contract with him violated. While, on the other hand, there may be the same difficulty in ascertaining the carrier at fault in regard to baggage as in the case of ordinary freight."

This, however, is not very satisfactory, seeing that in the case of ordinary freight the most of our courts hold that in the absence of special contract the initial carrier is not liable for losses occurring beyond its own line, though it may be difficult to say where the loss occurred. *Hutchinson Carriers*, sec. 149. For an extensive citation of cases upon this controverted point see note to case last mentioned, 16 Am. & Eng. R. Cas. 228.

In Ohio it is held that where the first carrier receives fare for the whole journey, and there is no agreement as to risks, it is liable on receipt of the passenger's baggage to transport it safely to the point of destination, and there to deliver it to

him on demand. *Baltimore R. Co. v. Campbell*, 36 Ohio St. 647, 3 Am. & Eng. R. Cas. 246.

By statute in Missouri the acceptance by a railway of goods consigned to a point beyond its lines is evidence of a contract for through shipment. *Hance v. Wabash R. Co.*, 56 Mo. App. 476. This does not, however, prevent a carrier from stipulating for exemption beyond his own line. *Dimmit v. Railroad Co.*, 103 Mo. 433; *Boorman v. American Express Co.*, 21 Wis. 154.

The first carrier may in all cases by contract limit its liability to cases of loss occurring on its own line. *Wabash R. Co. v. Harris*, 55 Ill. App. 159; *Texas R. Co. v. Hawkins*, (Texas Civ. App., 1895) 30 S. W. Rep. 1113; *Minter v. Southern Kansas R. Co.*, 56 Mo. App. 282; *Belts v. Farmers' Loan Co.*, 21 Wis. 80; *Myrick v. Railroad*, 107 U. S. 192, 9 Am. & Eng. R. Cas. 25; *Detroit R. Co. v. McKenzie*, 43 Mich. 609; *Hunter v. R. Co.*, 76 Tex. 195, 42 Am. & Eng. R. Cas. 501; *Berg v. R. Co.*, 30 Kan. 561; *Ortt v. Railway Co.*, 36 Minn. 346; *Harris v. Railway Co.*, 15 R. I. 371, 26 Am. & Eng. R. Cas. 323; *Knight v. Railroad Co.*, 13 R. I. 572; *McConnel v. Railroad Co.*, 86 Va. 248, 40 Am. & Eng. R. Cas. 155; *Jones v. Railway Co.*, 89 Ala. 376, 45 Am. & Eng. R. Cas. 321; *Texas R. Co. v. Adams*, 78 Tex. 372; *Tolman v. Abbott*, 78 Wis. 192. This is true in the states where the English rule prevails. *Illinois R. Co. v. Frankenberg*, 54 Ill. 88. Such limitation may be shown by a receipt given for baggage. *Pendergast v. Adams Express Co.*, 101 Mass. 120.

A carrier cannot be compelled to transport baggage beyond its own line; yet it may contract to do so; and when such a contract is made it assumes all the obligations of a common carrier over the connecting lines as well as over its own. *Atchinson R. Co. v. Roach*, 35 Kan. 740, 27 Am. & Eng. R. Cas. 257.

The question whether such a contract was made is one for the jury. *Railroad Co. v. Pratt*, 22 Wall. 123.

The question sometimes arises whether transportation arrangements and associations made between different lines of carriers render them all liable to third persons as partners for the default of either.

In *Croft v. Baltimore R. Co.*, 1 McArthur (D. C.) 492, where

fares on several lines were divided according to established rates, but there was no division of losses, it was held that the first carrier was liable for losses occurring on any of the lines, but that connecting carriers were only responsible for losses occurring on their several lines.

In Georgia it is held that in case of connecting roads which are associated together forming a continuous line, each road having the right to sell through tickets with coupons over the several roads, the price to be divided among them at periodical settlements, the road so selling such tickets is the agent of the other companies composing the line, that they are partners as to such through business, and that either road may be sued for a loss occurring anywhere on the line. *Wolff v. Central R. Co.*, 68 Ga. 653, 6 Am. & Eng. R. Cas. 440.

So held where the fares were divided in proportion to the mileage of each road. *Bostwick v. Champion*, 11 Wend. 571. This rule was applied to carriers by water in *Fairchild v. Slocum*, 19 Wend. 329. See also *Hart v. Van Rensselaer R. Co.*, 8 N. Y. 37; *Le Sage v. Great Western R. Co.*, 1 Daly 306.

To the same effect see *Texas R. v. Fort*, (Tex., 1882) 9 Am. & Eng. R. Cas. 392; *Harp v. The Grand Era*, 1 Woods 184, 11 Fed. Cas. 571. As the rule in *Muschamp's* case is convenient for the passenger, since by it the first carrier is liable for any loss sustained anywhere on the whole transit, so the rule thus held in the cases last cited possesses a like advantage. Wood, C.J., in *Harp v. The Grand Era*, *supra*, says:

"It sometimes happens that in the course of transportation freight passes into the custody of four or five different steamers or railroads, all forming one line, and giving through bills of lading. To require the owner to ascertain to which one the damage is attributable before he brings his action is putting a burden upon him which makes relief almost impossible."

To the same effect see *Texas R. Co. v. Ferguson*, (Texas, 1882) 9 Am. & Eng. R. Cas. 395.

Several of these cases are criticised and dissented from in *Atchison R. Co. v. Roach*, 35 Kan. 740, 27 Am. & Eng. R. Cas. 257.

In many cases it is held that the sale of tickets and check-

ing of baggage over several lines is not sufficient to show that they are partners so as to make each answerable for the defaults of the other. *Atchison R. Co. v. Roach*, 35 Kan. 740, 27 Am. & Eng. R. Cas. 257; *Hot Springs R. Co. v. Trippe*, 42 Ark. 465, 48 Am. Rep. 65; *Sumner v. Walker*, 30 Fed. Rep. 261; *Hartan v. Eastern R. Co.*, 114 Mass. 44; *Felder v. Columbia R. Co.*, 21 S. Car. 35, 27 Am. & Eng. R. Cas. 264; *Marmonstein v. Pennsylvania R. Co.*, 13 Misc. Rep. (N. Y.) 32; *Kessler v. Railroad*, 7 Laus. 62; *Elmore v. Railroad*, 23 Conn. 457; *Hood v. Railroad*, 22 Conn. 1; *Knight v. Railroad*, 56 Me. 234; *Nashville R. Co. v. Sprayberry*, 9 Heisk. 852; *Hartan v. Railroad Co.*, 114 Mass. 44; *Brooke v. Railroad*, 15 Mich. 232; *Stinson v. Railroad*, 98 Mich. 83; *Ellsworth v. Turtt*, 26 Ala. 733; *Hood v. New York R. Co.*, 22 Conn. 1.

The fact of such sale of tickets and the corresponding checking of baggage over the connecting lines is, however, admissible with other testimony in order to show what the real understanding of the parties was. *Quimby v. Vanderbilt*, 17 N. Y. 306; *Hutch. Car.*, sec. 152.

When the evidence is uncertain or conflicting, the question whether there was a special contract on the part of the carriers extending its liabilities beyond its own line, is one for the jury. *Lowell v. Sargent*, 8 Allen, 189.

In settling disputed questions of fact, the course of business of the carrier in respect of baggage passing over its lines and to be transferred over connecting lines is entitled to grave consideration. *Ouimit v. Henshaw*, 35 Vt. 605. And the court will take judicial notice of the common system of checking baggage over connecting lines. *Isaacson v. New York R. Co.*, 94 N. Y. 278, 16 Am. & Eng. R. Cas. 188. The court doubted in the case last cited whether, without special authority, a baggage-master of a railway company can bind his principal by checking baggage beyond the end of its road.

It was held in *Atchison R. Co. v. Roach*, 35 Kan. 740, 27 Am. & Eng. R. Cas. 257, that the sale of a through ticket for a single fare, and the checking of baggage to a point on a connecting line, without other evidence, will make the first carrier liable for a loss occurring on any connecting line; but

will not render the last carrier liable for the negligence of the contracting carrier, or of any other connecting carrier.

But where owners of different lines connected with each other divide the fares received on their several lines in some proportion agreed upon, they are sometimes held to have assumed the position of partners as to third persons, though not in fact partners as between themselves. Very fine distinctions are sometimes requisite in cases of this sort; and a full review of the decisions on this point, mostly relating to carriers of goods, would exceed the prescribed limits of this note. See *Hutch. Car.*, sec. 158, *et seq.* The following cases may be consulted: *Laughter v. Pointer*, 5 B. & C. 547; *Weyland v. Eckins*, Holt N. P. 227; *Fromont v. Coupland*, 2 Bing. 170; *Cobb v. Abbot*, 14 Pick. 289; *Carter v. Peck*, 4 Sneed 203; *Champion v. Bostwick*, 11 Wend. 571; s. c., 18 Wend. 175; *Pattison v. Blanchard*, 1 Seld. 186; *Cincinnati R. Co. v. Spratt*, 2 Duv. (Ky.) 4; *Block v. Fitchburgh R. Co.*, 139 Mass. 308, 21 Am. & Eng. R. Cas. 1; *Hart v. Railroad Co.*, 8 N. Y. 37; *Converse v. Norwich Transp. Co.*, 33 Conn. 166; *Gass v. Railroad*, 99 Mass. 220; *Briggs v. Vanderbilt*, 19 Barb. 222; *Ins. Co. v. Railroad Co.*, 104 U. S. 146, 3 Am. & Eng. R. Cas. 260; *Swift v. Steamship Co.*, 106 N. Y. 206, 30 Am. & Eng. R. Cas. 105; *Ellsworth v. Tarrt*, 26 Ala. 733; *Carter v. Peck*, 4 Sneed 203.

These and other cases are reviewed and referred to in Hutchinson on Carriers, and from them the learned editor, Mr. Mechem, infers the following rule:

“First. That where carriers over different routes have associated themselves under a contract for the division of the profits of the carriage in certain proportions, or of the receipts from it after deducting any of the expenses of the business, they become jointly liable as partners to third persons; but that, where the agreement is that each shall bear the expenses of his own route and of the transportation upon it, and that the gross receipts shall be divided in proportion to distance or otherwise, they are partners neither *inter se* nor as to third persons, and incur no joint liability. Secondly. That, where they jointly employ a common agent in the prosecution of a joint enterprise as carriers, they become jointly liable for

his defaults, but do not become responsible for each other's acts merely by reason of the employment of such common agent. Nor will a contract for through transportation over their several lines made by him, although authorized by an arrangement between them, create a joint liability or a liability for the defaults of each other, it not being shown that such companies were jointly interested in the expenses of the transportation. Thirdly. That, in order to hold one carrier responsible for the defaults of another, a partnership between them must be shown, either express or implied from the circumstances; or it must appear that the one was acting in the transportation as the agent of the other against whom the recovery is sought; and that the mere employment of a common or joint agent with authority to contract for through transportation over connecting routes, under an arrangement for the division of the receipts for such transportation in proportion to distance or other service, will generally constitute neither such a partnership nor agency, each for the other, as will make them jointly liable or liable for each other's acts in the transportation. Fourthly. That carriers, like other persons, may become liable for each other's acts as partners to third persons who may have sustained injuries through their defaults or misfeasances, when as between themselves there is no partnership nor mutual responsibility." *Hutch. Car.*, sec. 169.

This statement of the rule was approved in *Peterson v. Railway Co.*, 80 Iowa, 92.

In *Bradford v. South Carolina R. Co.*, 7 Rich. (S. Car.) 201, a joint contract was inferred from an advertisement jointly made.

Where baggage is checked through, the passenger has no duty to perform in regard to it during transit; but it is the duty of each carrier to transport it over its line, and to deliver it safely to the succeeding carriers. *Campbell v. Caledonian R. Co.*, 14 Scot. Sess. Cas. N. S. 806; *Check v. Little Miami R. Co.*, 2 Disney, 237.

A check of a carrier and delivery of part of the baggage at the end of its line will raise a presumption that all of the baggage was received by it. *McCormick v. Hudson River R. Co.*,

4 E. D. Smith, 181; *Louisville R. Co. v. Weaver*, 9 Lea (Tenn.) 38, 16 Am. & Eng. R. Cas. 218.

Where the first carrier sold a ticket for an excursion over the whole route and received baggage to be sent through without change of cars, the baggage not being checked, the agent telling the passenger that it would be perfectly safe, it was held that the first carrier was liable for a loss occurring anywhere on the route. *Najac v. Boston R. Co.*, 7 Allen, 329.

In South Carolina it is held that in a suit against a connecting carrier for the loss of baggage, the complaint must either show that the defendant and the initial carrier were joint contractors or that the baggage had been received by the defendant. *Felder v. Columbia R. Co.*, 21 S. Car. 35, 27 Am. & Eng. R. Cas. 264.

Where one buys a through ticket over several lines, the agent who sells it is presumed to be the agent of each and all the carriers, and each is bound by his statements and agreements. *Young v. Pennsylvania R. Co.*, 115 Pa. St. 112, 28 Am. & Eng. R. Cas. 114.

Where a baggage-master checks baggage his action binds his principal, although he may check it over a route for which he has no authority to check it. *Isaacson v. New York R. Co.*, 94 N. Y. 278, 16 Am. & Eng. R. Cas. 188.

In Tennessee it is held that where a carrier sells a ticket and checks baggage to a destination beyond its own line it is liable for a loss occurring on the connecting line. *Louisville R. Co. v. Weaver*, 9 Lea (Tenn.) 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218.

In New York it is held that the sale of a ticket by a carrier to a point beyond its own line renders it liable for the loss of baggage on a connecting line, though the ticket is a coupon ticket, specifying that the company selling it is agent for the connecting line, and shall only be liable for such damages 'as may occur on its own line. *Talcott v. Wabash R. Co.*, 66 Hun, 456, and cases cited in opinions delivered.

So it is held that a carrier who receives a passenger and his baggage to be conveyed beyond its line is liable for its safe delivery at the place of destination. *Burnell v. New York R.*

Co., 45 N. Y. 184; *Carey v. Cleveland R. Co.*, 29 Barb. 35; *Torpey v. Williams*, 3 Daly, 162.

But this rule was held not to apply where a railway company checked baggage beyond its line to the terminus of a connecting steamboat line, but where it did not appear that the passenger had paid his fare on the steamboat. *Green v. New York R. Co.*, 4 Daly, 553.

A carrier which has accepted baggage to be carried beyond its own line must prove a delivery to the connecting carrier before it can be relieved of its obligation as a common carrier. *Hyman v. Central R. Co.*, 66 Hun, 202; *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1; *Rome R. Co. v. Wimberly*, 75 Ga. 316, 58 Am. Rep. 468; and the fact that the baggage, on its arrival at the connecting station, at a depot used by both carriers, was taken in charge by their common agent, and placed in the common baggage-room, where it was destroyed by fire, is not sufficient to relieve the first carrier from such liability. *Hyman v. Central R. Co.*, 66 Hun, 202.

In cases where a first carrier was a corporation, the objection has often been made that contracts by it to carry over connecting lines were *ultra vires*; but this contention has generally been overruled. *Wilby v. R. Co.*, 2 H. & N. 703; *Bissell v. Michigan R. Co.*, 22 N. Y. 258; *Railroad Co. v. Pratt*, 22 Wall. 123; *West v. Railroad*, 4 Selden, 57; *Swift v. Steamship Co.*, 106 N. Y. 206; *Buffet v. Railroad*, 40 N. Y. 168; *Root v. Railroad*, 45 N. Y. 524; *Bartis v. Railroad*, 24 N. Y. 269; *Noyes v. Railroad*, 27 Vt. 110; *Hill Mfg. Co. v. Railroad*, 104 Mass. 122; *Feital v. Railroad*, 109 Mass. 398; *Schroeder v. Railroad*, 5 Duer, 55; *West v. Railroad*, 4 Selden 57. But in Connecticut such contracts are held to be *ultra vires* and void. *Hood v. Railway Co.*, 22 Conn. 502; *Naugatuck R. Co. v. Button Co.*, 24 Conn. 468; *Converse v. Transportation Co.*, 33 Conn. 166; and in Massachusetts it is held that when a corporation is created for the purpose of transportation over a certain line, the presumption is against a contract to carry beyond the terminus of its line. *Burroughs v. Railway*, 100 Mass. 26, *Pendergast v. Adams Express Co.*, 101 Mass. 123. In Maine it is held that such a contract must be express. *Perkins v. Railroad*, 47 Me. 573.

Where a passenger bought a coupon ticket, containing a

printed notice at the top, limiting the liability of the first carrier to losses occurring on its own line, it was held that the limitation was valid, though the passenger did not read the notice. *Central Trust Co. v. Wabash R. Co.*, 31 Fed. Rep. 247.

Where a carrier sold a ticket to a point beyond its own line, which ticket contained a printed notice that as to the connecting line beyond its own terminus it only acted as agent of the owner of such line, it was held that the first carrier was not liable for a loss occurring on the connecting line. *Harris v. Howe*, 74 Tex. 534, 39 Am. & Eng. R. Cas. 498.

In Virginia it is held that a notice limiting the liability of the carrier to losses occurring on his own line is not binding on the passenger unless it is shown that he had actual notice of this restriction and that he assented to it. *Wilson v. Chesapeake R. Co.*, 21 Gratt. 654. So held also in *Mauritz v. New York R. Co.*, 23 Fed. Rep. 765, unless the passenger's attention was called to the notice, or circumstances were such as to make it negligence for him not to read it. Such a notice is binding on the passenger if assented to by him. *Peterson v. Chicago R. Co.*, 80 Iowa, 92.

Where a passenger received his ticket in Pennsylvania for a passage to New York, and also received a check for delivery of his baggage in New York, and the baggage was not delivered there, it was held that the liability of the carrier should be decided by the laws of New York, and without reference to a Pennsylvania statute defining the liability of carriers in such cases. *Curtis v. Delaware R. Co.*, 74 N. Y. 116.

Where a passenger gives up the check of one carrier and receives another in lieu of it from a second carrier, the presumption is that the latter has received the baggage, and that it is responsible for it. *Ahlbeck v. St. Paul R. Co.*, 39 Minn. 424. And where a passenger took a through ticket, with the option of going upon either of two connecting lines to his place of destination, and upon arriving at the junction of the connecting lines he re-checked his baggage over one of them, it was held that the second carrier did not enter into a new contract by re-checking the baggage, but that this was done in pursuance of the original agreement. *Candee v. Pennsylvania R. Co.*, 21 Wis. 582.

So where the passenger had the privilege of staying over for the night at a certain point, and did so, having his baggage carried to his lodgings, but re-delivered it to the carrier the next morning, it was held that the continuity of the bailment was not broken. *Wilson v. Chesapeake R. Co.*, 21 Gratt. 654.

A transfer company receiving a check from a passenger in a railway train is a connecting carrier, and when sued for the loss of the baggage represented by the check, it must show that it was lost by the railway company. *Myerson v. Woolverton*, 9 Misc. Rep. (N. Y.) 186.

Where baggage sent over several lines arrives at its destination in a damaged condition, or rifled of part of its contents, in a suit against the last carrier he must show that it was so damaged or rifled before he received them. But when it does not so arrive, there must be evidence on the part of the plaintiff to show that the defendant received it. *Express Co. v. Hess*, 53 Ala. 19; *Brintnall v. Railway Co.*, 22 Vt. 665; *Railway Co. v. Culver*, 75 Ala. 587, 22 Am. & Eng. R. Cas. 411; *International R. Co. v. Folts*, 3 Tex. Civ. App. 644; *Railway Co. v. Holloway*, 9 Baxt. 188; *Smith v. Railroad Co.*, 43 Barb. 225; *Laughlin v. Railway Co.*, 28 Wis. 204; *Schrivver v. Railroad Co.*, 24 Minn. 506; *McQueston v. Sanford*, 40 Me. 117; *Dixon v. Railroad*, 74 N. Car. 538. The defendant may of course show that the baggage was not damaged while on its line, or in its care or custody. *Burwell v. Railroad Co.*, 94 N. Car. 455, 25 Am. & Eng. R. Cas. 410. But where suit is brought against a connecting carrier the plaintiff must show that the baggage came to the possession of the defendant, or that there was a partnership responsibility existing between the initial carrier and the defendant. *Felder v. Columbia R. Co.*, 21 S. Car. 35.

In Georgia it is held that the last carrier is liable for lost baggage, though it may never have received it, being made so by the reception of its part of the fare of the passenger, the last carrier having a remedy over against the real delinquent. *Savannah R. Co. v. McIntosh*, 73 Ga. 532, 27 Am. & Eng. R. Cas. 269; *Wolff v. Central R. Co.*, 68 Ga. 653 6 Am. & Eng. R. Cas. 441. On the same principle the first carrier is liable, though it may have safely delivered the baggage to its succeeding carrier. *Hawley v. Screven*, 62 Ga. 347.

In *Lin v. Terre Haute R. Co.*, 10 Mo. App. 125, the court held that evidence that when delivered by the last carrier baggage appeared to have been broken open, and part of its contents were missing, made a *prima facie* showing that the loss occurred through the fraud or negligence of the last carrier.

In *Lindley v. Railroad Co.*, 88 N. Car. 547, 9 Am. & Eng. R. Cas. 31, it was held that where the last connecting carrier delivered baggage in a damaged condition, this would raise a *prima-facie* presumption that it was damaged while in the hands of the first or receiving carrier; but that no such presumption arises as against an intermediate carrier.

The burden of proof is on the first carrier to show that the baggage was safely carried over its line, and that it was delivered to the next carrier. *Philadelphia R. Co. v. Harper*, 29 Md. 330.

A connecting carrier is not entitled to the benefit of a contract limiting liability made with the first carrier unless it appears that the first carrier was bound for its full performance, so as to make the connecting carrier its agent, or that the consideration of the special contract extended and applied to the connecting line also. *Central R. Co. v. Bridger*, 94 Ga. 471. But in *Halliday v. St. Louis R. Co.*, 74 Mo. 159, 6 Am. & Eng. R. Cas. 433, it is held that simply by accepting articles for transportation the second carrier becomes entitled to claim the benefits of all valid exceptions made with the shipper. This rule is supported by the weight of the authorities. *Laws. Car.*, sec. 243. It has no application, however, where it appears that the exceptions were reserved solely for the benefit of the first carrier. *Id.*, sec. 244. Such exceptions must be pleaded. *Halliday v. St. Louis R. Co.*, *supra*.

In Texas it is held that where baggage is checked over several connecting lines, it is subject to the contract made with the first carrier. *Gulf R. Co. v. Ions*, 3 Tex. Civ. App. 619.

The failure of the carrier to deliver baggage according to the terms of his contract, *prima facie* shows negligence; and the burden of accounting for the default lies upon him. *Burnell v. New York R. Co.*, 45 N. Y. 184. The same rule applies in case of non-delivery by an intermediate carrier to the next succeeding carrier. *Baltimore Steam Packet Co. v. Smith*, 23

Md. 402. Where baggage is checked over such intermediate line, but is not delivered by the first carrier to it, prompt notice should be given to the first carrier, or to the owner; and failing to do so, the intermediate carrier will be liable for the loss. *Davis v. Michigan R. Co.*, 22 Ill. 278.

Where it is shown that a carrier has received baggage, and it does not account for it in any way, the inference is warranted that it was stolen by its servants, or that it was lost in consequence of their gross neglect. *Rome R. Co. v. Wimberly*, 75 Ga. 316, 58 Am. Rep. 468. Nor is the charge of negligence disproved by a showing that, instead of delivering the baggage to a connecting carrier, it had been placed in a safe and secure warehouse, in charge of trusty servants, and that it was properly guarded by day and by night. *Id*

Where a passenger sues a connecting line, he cannot recover by proving that his baggage was checked over it; but he must also show that he paid his fare over the connecting line. *Green v. New York R. Co.*, 12 Abb. Pr. N. S. 473. Also that the baggage was received by the defendant. *Kessler v. New York R. Co.*, 61 N. Y. 538.

Where the defendant carrier in his plea merely denies receipt of the baggage, the plaintiff need not prove non-delivery. *Hot Springs R. Co. v. Hudgins*, 42 Ark. 485.

In a suit against one of the several carriers of connecting lines the plaintiff must show the liability for loss of baggage on the part of the defendant sued. *Boston R. Co. v. Ordway*, 140 Mass. 510; *Mulland R. Co. v. Bromley*, 17 C. B. 372; *McCormick v. Hudson River R. Co.*, 4 E. D. Smith, 181; *Anchor Line v. Dater*, 68 Ill. 369; *Kessler v. New York R. Co.*, 61 N. Y. 538. Nor will this requirement be obviated by suing all of the carriers in one suit. *Anchor Line v. Dater*, *supra*; *Chicago R. Co. v. Northern Packet Co.*, 70 Ill. 217; *Hutch. Car.* 760.

Where it appears that the baggage was damaged when delivered by the defendant carrier to a connecting carrier, the burden is on the defendant to show that the damage was occasioned by some cause exempting him from absolute liability for safe delivery. *Montgomery v. Culver*, 75 Ala. 587, 22 Am. & Eng. R. Cas. 411; *Lin v. Terre Haute R. Co.*, 10 Mo. App. 125.

The last carrier is responsible for baggage which is shown to have come into its possession. *McCormick v. Hudson River R. Co.*, 4 E. D. Smith, 181.

To relieve itself from liability the carrier receiving baggage for a connecting line must show that it delivered it to such connecting line by evidence that would be sufficient to charge it if the suit was against it. *Hyman v. Central R. Co.*, 66 Hun 202.

Mere failure on the part of the last carrier to deliver baggage, which it is not shown to have received, is not of itself proof of negligence. *Stimson v. Connecticut River R. Co.*, 98 Mass. 83; *Kessler v. New York R. Co.*, 61 N. Y. 538; *Milnor v. New York R. Co.*, 53 N. Y. 363; *Ward v. New York R. Co.*, 56 Hun, 268; *Felder v. Columbia R. Co.*, 21 S. Car. 35, 53 Am. Rep. 656.

It has been held that where a passenger purchases a through ticket, with a coupon for each line of carriers, and has checked his baggage to his destination, if on his arrival it is found to be lost, he can hold the last carrier responsible for the loss. *Savannah R. Co. v. McIntosh*, 73 Ga. 532, 27 Am. & Eng. R. Cas. 269; *Hawley v. Screven*, 62 Ga. 347; *Wolff v. Central R. Co.*, 68 Ga. 653, 6 Am. & Eng. R. Cas. 441; *International R. Co. v. Folts*, 3 Tex. Civ. App. 644; *Peterson v. Chicago R. Co.*, 80 Iowa, 92.

In *Gray v. Jackson*, 51 N. H. 9, the court hold that the question as to whether the initial carrier contracted for carriage beyond its own line is one of fact in each case. See also *Farmers' Bank v. Champlain Trans. Co.*, 23 Vt. 213; *Morse v. Brainard*, 41 Vt. 550; *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189; *Hart v. Railroad Co.*, 8 N. Y. 37; *Curey v. Railroad Co.*, 29 Barb. 35. But where the evidence is uncontradicted, or where the question depends on written stipulations, it is, however, one for the court. 2 *Reelf. Railways*, sec. 180, 3.

In *Gray v. Jackson*, 51 N. H. 9, it is suggested that a carrier's silence and omission to give notice of the extent of his route would be evidence tending to show, by way of estoppel, a mutual understanding that the carrier undertook to carry beyond his route.

THE
AMERICAN AND ENGLISH
RAILROAD CASES

NEW SERIES.

VOL. II.

CHURCH (Richard M.)

v.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY Co.

(Supreme Court of South Dakota, Nov. 19, 1894.)

Carriers of Passengers. [(1) p. 18].—**Contract of Carriage.** [(2) p. 16].—A ticket issued by a railroad company, for passage from one point to another, named upon such ticket, gives the holder the right to transportation over the road between such points, subject to such reasonable rules and regulations as the company has a right to make concerning the running of its trains and the route over which they shall run. (*Page 3.*)

Same—Rules and Regulations [(3) p. 22].—**Reasonableness of.**—It is a reasonable regulation for a company, operating direct and also indirect and circuitous lines of road between two points, to require that passengers travelling upon a simple contract to carry from one point to the other, shall go by the most direct route; and such reasonable regulation becomes a part of the contract of carriage. (*Page 4.*)

Same—Failure of Company to Notify Passenger of a Regulation Requiring Passage upon the Most Direct Route.—The failure of a railroad company to notify a passenger of a regulation of the road that passengers shall travel by the most direct route between the points named upon their tickets, does not affect the contractual rights of the parties so as to entitle the passenger to ride between such points on other lines of the company than those established as the true route by such regulation. (*Page 7.*)

Same—Failure to Notify Passenger of Change of Cars at Distant Junction.—Rights of Passenger. [(1) p. 18, (2) p. 16].—In the case at bar it is held that the fact that a passenger told the company's gate-keeper at the depot at Milwaukee, Wis., where she embarked, that she desired to go

Contract of
Carriage

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to Artesian, S. D., her place of destination, by way of Prairie du Chien and Mitchell, and that the gate-keeper directed the passenger to the proper train, without informing her that she would have to change cars at Canton, a junction some 500 miles distant, or that she could not go on the ticket which she held from Canton to Artesian by way of Mitchell, did not entitle her to go by that route against the regulation of the company. (*Page 7*).

Same—Same—Ejection of Passenger [(1) p. 156].—**Instructions to Jury.**—Respondent's wife procured a ticket from Milwaukee, Wis., to Artesian, S. Dak. The company had two established routes between these points, one of which she took by way of Prairie du Chien, Canton and Egan. By this route she should have changed cars at Canton, S. D., for Egan. She did not change, but continued on the train west, and insisted upon her right to go to Artesian by way of Mitchell and Woonsocket, over which line the company had no through route. Refusing to pay fare she was ejected.

Held, that while the failure of the company to notify her to change at Canton might, if a neglect of an imposed duty, be the ground of damages, it did not entitle her to ride upon such ticket over the indirect route by way of Mitchell and Woonsocket; and an instruction to the jury that she was lawfully on such train over such route, if she did not know of such regulation, and that the conductor had no right to put her off the train, was error. (*Pages 7, 8*).

APPEAL from Sanborn county circuit court. *Reversed*.

Preston & Hannett (*Burton Hanson*, of counsel), for appellant.

KELLAM, J.—This action was brought by respondent against appellant to recover damages on account of expense incurred, and loss of services of his wife, Julia A. Church, who he alleges was lawfully on one of appellant's trains, and was wrongfully ejected therefrom. Respondent and his wife resided in the town of Artesian, in this state, a station on an east and west line of appellant's road. In September, 1889, having been for several months in the state of Michigan, she desired to return to Artesian. Her husband procured and had sent to her the return coupon of a Grand Army excursion ticket, both coupons of which were good for a trip from Artesian to Milwaukee and return.

It was shown by the company, and was not disputed, that it had two established routes from Milwaukee to Artesian, over either of which a passenger might make a continuous passage from the former to the latter place,—one by way of Prairie du Chien, McGregor, Canton, and Egan, thence west to Artesian; the other by way of La Crosse, thence west, through Egan, to Artesian. Mrs. Church took the train at Milwau-

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kee for the first-named route, and proceeded as far as Canton, where, instead of changing cars for Egan, as she should have done to continue on the route named, she remained on the train with the intention of going to Mitchell, there changing and going north to Woonsocket, and thence, after another change, east to Artesian.

After passing Canton, the conductor, finding her still on his train, examined her ticket, and informed her that she was on the wrong train, that she should have changed at Canton, and that her ticket would not take her to Mitchell. She insisted that her ticket entitled her to go by way of Mitchell and Woonsocket, refused to pay her fare, and was put off the train at Worthing, the next station.

Appellant contends that the facts disclosed show that respondent and his wife were practicing a fraud upon the company in procuring and using this excursion ticket, sold at reduced rates to enable purchasing parties to attend the Grand Army reunion at Milwaukee, under circumstances and for a purpose which they well knew were not contemplated by the company. They also insist that there was no evidence justifying the court in submitting to the jury the question of actual damages. There was also some conflicting testimony as to the deportment of the conductor, and the manner of her removal from the train, upon which is based a claim of undue and excessive force; but as we think the trial court erroneously instructed the jury as to her rights and the company's duty in the premises, which might and probably did influence the jury, for which the judgment must be reversed, we notice only such error.

The first question which the facts in this case naturally suggest is this: Did Mrs. Church's ticket entitle her to ride from Canton to Artesian by way of Mit- chell and Woonsocket?

The court instructed the jury as follows: "The rules of the defendant company required that she should change cars at Canton, and proceed to Artesian by way of Egan. If Mrs. Church knew this rule, or if she was informed, at or before reaching Canton, that the rules of the company required her to change at Canton, she was unlawfully on the train at Worthing, and plaintiff cannot recover if she was removed from the train in a proper manner; but if she did not know of such rule, and was not informed of it, she was lawfully upon

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the train at Worthing, and the conductor had no right to put her off. Mrs. Church was not bound to inquire whether she should change cars at Canton; but if, by any means, she had been informed that she should make such change, she should have made it, and should not have remained on the train west of Canton."

Mrs. Church's right to transportation by the appellant company was just what her contract gave her. That contract was to carry her from Milwaukee to Artesian, subject to such reasonable rules and regulations as the company had a right to make concerning the management and running of its trains and the routes over which they should run. She was entitled to be carried through with ordinary and reasonable dispatch, but she had no right under such contract to select her route, as against a rule or regulation of the company prescribing a different and more direct route, if such regulation were a reasonable one.

The law is well settled that a railroad company, as a common carrier, may prescribe and enforce regulations for the conduct of its business in carrying passengers, so long as such regulations are reasonable. Regulations which have uniformly been held reasonable by the courts extend over a wide range of details, and it certainly ought not to be held unreasonable to allow a company, operating direct and indirect lines of road between two points, to require, by general rule, that passengers travelling upon a simple contract to carry from one point to the other should go by the most direct route. The right of the company to make such a regulation can hardly be doubted in view of its reason and justice, and certainly not in view of the many adjudications sustaining regulations which would seem much more unnecessary and arbitrary.

Such regulations become and are a part of the contract of carriage. In *Dietrich v. Railroad Co.*, 71 Pa. St. 436, the court said: "So far as they are expressed, the terms are binding, of course; but such tickets are not the whole contract, which must be gathered, so far as not expressed, from the rules and regulations of the company in running its trains."

In *Johnson v. Railroad Corp.*, 46 N. H. 221, it is said "that, in the absence of any special agreement, the parties are deemed to have contracted with reference to the established existing usage."

**Reasonable
regulations.**

**Regulations
are part of
contract.**

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In the case before us there was no evidence of any usage inconsistent with the rule of the company. In *Railroad Co. v. Randolph*, 53 Ill. 515, the court says: "When a passenger purchases a ticket, he only acquires the right to be carried according to the custom of the road. * * * He does not acquire the right to insist that the company shall send him on a special train, or out of the customary course of their road." This language is quoted and approved in *Platt v. Railway Co.*, 63 Wis. 516, 21 Am. & Eng. R. Cas. 319.

Bennett v. Railroad Co., 60 N. Y. 594, was a case where facts were quite correspondent with those in the case before us. The plaintiff bought a ticket from "Lockport to Troy." Between Rochester and Syracuse the company operated two lines, one 23 miles shorter than the other. A rule of the company required through passengers to go by the shorter route. The plaintiff—innocently, it would appear—took a train passing over the more indirect route, and over which, by regulation of the company, his ticket was not good. He refused to pay fare, and was ejected. In an action for damages the court of appeals affirmed a judgment nonsuiting the plaintiff, in its opinion saying that the company's contract was "to carry the plaintiff over the usual, through, and most direct route, and nothing more. * * * Here it must be presumed that the company was ready and willing to perform the contract as made; but the plaintiff desired to go over the Auburn road, and must have changed cars at Rochester for that purpose, and the claim for additional compensation was both lawful and just."

The rule of the company that a ticket from Canton to Artisan should be good only by way of Egan was in law a reasonable one. The distance was less,—only a few miles, to be sure; but the right of a passenger to compel the company to carry him 10 miles more than he has contracted and paid for is not changed in principle by increasing the distance. In either case he is demanding what he has not bought and paid for.

The instruction complained of, however, and in which we think we find error, does not condemn the regulation as unreasonable, but says it did not control Mrs. Church's rights as a passenger unless she had knowledge of it. It says: "But if she did not know of such rule, and was not informed of it, she was lawfully on the train at Worthing, and the conductor had no right to put

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regulations by
passenger.

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her off. We think a rule quite inconsistent with this instruction has the support of the authorities.

In *Dietrich v. Railroad Co.*, *supra*, the court used this language: "The authorities, as well as the reason of the thing, show that the company must make its own regulations, and that passengers purchase their tickets subject to those rules, and that it does not lie on the company to bring home notice of them in order to establish the terms of the contract of carriage." And again, in the same opinion: "It is also well settled that one who buys a ticket is bound to inform himself of the rules and regulations of the company governing the transit and conduct of its trains."

In *Railroad Co. v. Randolph*, *supra*, the court says: "When a traveler obtains such a ticket he should inform himself as to the usual mode of travel on the road, and, so far as the customary mode of carrying passengers is reasonable, he should conform to it. * * * The requisite information can always be had from the agent where the ticket is purchased, and it is but reasonable to require passengers to obtain the information, and to act upon it."

In *Hall v. Railroad Co.*, 15 Fed. Rep. 65, HAMMOND, J., says: "It is, in my judgment, the duty of a passenger to see to it, before he takes a train, that his ticket will carry him on that train." In *Cheney v. Railroad Co.*, 11 Metc. (Mass.) 121, the court, after noticing the form and contents of the ticket, says: "It therefore was a contract to carry in the usual manner in which passengers are carried who have tickets of that kind. It is said that the rules of the company were unknown to the plaintiff when he purchased the tickets, and therefore he ought not to be affected by them. This might be very properly insisted upon in his behalf if it were attempted to charge him with any liability created by such rules, especially if it were attempted to enforce any claim for damages by reason of them. The question as to the right of the plaintiff to be transported as a passenger does not depend upon his knowledge, at the time of the purchase of the ticket, of the difference of the price to be paid for a passage through the whole distance by one train or that of a passage by different trains. The plaintiff might have inquired, and informed himself of that. If he did not, he took the mode of conveyance the price of the ticket and the subscription thereon secured to him under the rules and regulations of the company.

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Johnson v. Railroad Corp., 46 N. H. 213, is to the same effect. The plaintiff testified: "I had no notice, knowledge, or information that the ticket would not be taken till I attempted to use it from Manchester to Boston." The court held that his want of knowledge did not affect his rights, or the company's duty, under the contract. The court say: "If it is understood by the public that the duty is on the traveler to inquire as to all such reasonable regulations as it may be important for him to know, we think there will result less inconvenience than from any holding of the law that tends to relieve the traveler from the duty of inquiring as to a part of such matters of regulation."

But even assuming that the duty lay upon the company to inform Mrs. Church that she should change cars at Canton, and that the conductor was in fault in not doing this, such neglect of duty towards a passenger might subject the company to damages, but it could not change the terms or legal effect of the contract of carriage. Her ticket was either good by way of Mitchell and Woonsocket or it was not. If not, and the conductor were in fault in not so informing her before reaching Canton, she mistook her remedy when she refused to pay fare, and insisted that the conductor should still further violate his duty, and expose himself to dismissal, by accepting a ticket which he was instructed not to accept.

Duty to notify
passengers of
route covered
by ticket.

Suppose a new conductor had taken the train at Canton; should he also, in violation of his instructions, have honored the ticket, if satisfied that she had not been notified to change at Canton? An affirmative conclusion would be exceedingly hard to justify. It would indorse a principle which would at once undermine and practically destroy the power of the carrier to enforce regulations which have constantly been upheld as reasonable, and which are equally essential to the carrier and the public.

Suppose Mrs. Church, originally starting from Canton, had simply bought a ticket from Canton to Artesian; what would have been the contract of the company? Clearly, to carry her over its customary and established route from the former to the latter point. This, by a rule or regulation of the company proved upon the trial, was by way of Egan. This route gave to the traveler a continuous passage.

The route by way of Mitchell and Woonsocket was longer,

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involved an extra change, and required nearly 24 hours' more time. It was a reasonable regulation of the company. Could she, with such a ticket, under the contract which it imported, rightfully insist upon being transported by way of Mitchell and Woonsocket, because she was not informed that her ticket was not good on these lines? If so, she would, for the same reason, on a ticket from Canton to Egan, be entitled to go by way of Mitchell, Woonsocket, and Artesian, back to Egan.

We discover nothing in the evidence which could be claimed as giving her any different rights on account of her ticket being from a point further east, except that she told the uniformed employé at the Milwaukee depot that she wanted to go by way of Prairie du Chien and Mitchell, and he directed her to the proper train, without informing her that she would be required to change at Canton for Artesian, or that her ticket was not good between Canton and Artesian by way of Mitchell. We do not, however, regard this as important. The particular duty of this employé was doubtless to assist passengers to take the right train, and this he did to Mrs. Church. He did not give her any misinformation. He simply did not advise her as to changes to be made at a junction 500 miles distant. We do not think his failure to do so, under the circumstances, affected the rights of either the defendant company or Mrs. Church.

There was no evidence tending to show any usage of the company inconsistent with the regulations proved; nothing to show that passengers were ever carried by way of Mitchell and Woonsocket on tickets from Canton to Artesian; nothing to justify Mrs. Church in believing she was entitled to go that way, except that her husband wrote her she could. It is in evidence that when she went east, a few months before, she did not go from Artesian to Canton by way of Woonsocket and Mitchell, but by way of Egan. We think the instructions of the court making the right of Mrs. Church, by virtue of her ticket, to transportation by way of Mitchell and Woonsocket to depend upon her knowledge of the rule of the company, was erroneous; and for that reason, without examining other alleged errors, its *judgment is reversed*, and the case is remanded for a new trial.

All the judges concur.

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Passenger

SCHEPERS (Theresa)

v.

UNION DEPOT RAILROAD CO.

(*Supreme Court of Missouri, Div. No. 1, Feb. 19, 1895.*)

Passenger and Carrier—The Relation, How Created [(2) p. 16]—Attempt to Board Moving Car as Constituting one a Passenger.—The relation of passenger and carrier can only be created by contract between the parties, express or implied. The mere attempt, therefore, to board a moving street car by a person who has not indicated his intention to do so in time to enable the persons in charge of the car to stop it at a proper place, does not create the relation of passenger and carrier. (*Page 13.*)

Same—Relation not Constituted Where Those in Charge of Car Pay no Attention to Signals of Person to Board it.—Where the persons in charge of a street-railway car neglect to pay attention to the signals of one wishing to board the car, the act of such intending passenger in attempting to get on the car while it is in motion will not of itself constitute him a passenger. (*Page 14.*)

Boarding of Moving Car—When not Contributory Negligence.—A man of mature age and experience who is in good physical condition is not guilty of contributory negligence as a matter of law in attempting to board an electric car moving at the rate of three or four miles an hour. (*Page 15.*)

Duty of Electric Street-railway to Provide Certain Fenders.—An electric street-railway company owes, to a person who is neither a passenger nor an employé, no duty to provide its cars with fenders designed solely for the protection of passengers and employés; hence, such company is not liable for injury to a person attempting to board a moving car, who has not properly made his intention known because of absence of such fender, unless, as a fact, the failure to supply it would amount to a want of ordinary care towards the general public. (*Page 16.*)

APPEAL from St. Louis county circuit court. *Reversed.*

G. A. Finkelnburg and *O. J. Mudd*, for appellant.

John A. Gilliam and *John W. Drabelle*, for respondent.

MACFARLANE, J.—This is an action, under the statute, to recover the sum of \$5000, as damages for the death of plaintiff's husband by the alleged negligence of defendant's employés in charge of one of its trains of street cars. A trial resulted in a verdict and judgment for plaintiff, and defendant appealed.

Defendant operated by electric power a line of street-cars

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along Russell avenue, Twelfth street, and other streets in the city of St. Louis. Russell avenue runs east and west through the city, and crosses Twelfth street at right angles. The railway track is located along Russell from the east to Twelfth street, where it turns south by a long curve onto that street. There is a rising grade on the avenue until Twelfth street is reached, from which there is a descending grade of about 4 feet in 100. Two cars, known as the "motor car and trailer," were run in a train on the occasion of the death of plaintiff's husband. A curve of the railway track extends down Twelfth street about 27 feet from the center of the cross walk on the south side of the avenue. On the southwest corner of these streets is a saloon having a side door opening to Twelfth street, near the corner of the building. Just prior to the accident, deceased was in the saloon, awaiting a train going south on Twelfth street, on which he intended taking passage. On seeing a train passing upon the curve, he left the saloon hastily, ran down Twelfth street, passed the trailer, and undertook to board the motor car while in motion, and in doing so was thrown down, and the trailer ran over him, causing his death.

The petition charges, in substance, that, while the cars were going slowly round the curve at Twelfth street and Russell avenue, he hailed them by beckoning with his hand, with the view of taking passage; that both the conductor of the motor and trailer car knew from his actions that he intended and desired to take passage thereon, but they negligently failed to signal the motorman thereof; that while the cars slowly rounded said curve he took hold of the motor car to get on, when the electric power was negligently, suddenly, and without warning, applied by the motorman with great force, by which the cars were suddenly jerked forward, and he was thereby thrown upon the track and killed. The petition also charged negligence in failing to provide a proper life guard between the two cars.

The answer was a general denial, and a plea of contributory negligence. An ordinance of the city required that "when any car shall be required to stop at the intersection of streets to receive or leave passengers it shall be stopped so as to leave the rear platform partly over the crossing."

The evidence offered by plaintiff tended to prove that when deceased came out of the saloon, at the side door, the hind or

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trailer car had not yet passed over the crossing; that deceased held up his hand as a signal that he wished to take passage, and that the conductor on the motor saw the signal, but gave no notice to the motorman to stop; that the train was then moving at the rate of three or four miles per hour; that deceased ran in a southeasterly direction towards the motor car, caught up with it, and took hold of the hand hold on the rear dashboard with his left hand, and as he reached with his right hand for the hand hold on the body of the car the speed was suddenly increased, and deceased was thrown down, and the trailer ran over him. It was shown by the evidence introduced by plaintiff that deceased was not on the street when the forward car reached the crossing, and that neither the motorman nor the conductor on the trailer saw him approaching the cars at all. The conductor on the motor car saw him when within 5 to 10 feet of that car, but gave no signal to stop until he saw the danger to which deceased was exposed. Evidence.

The evidence of defendant tended to prove that the hind car had passed the crossing before deceased came out of the saloon, and was running down the grade at increasing speed, and in the usual manner, when deceased undertook to board it; that there was no unusual jerk or sudden increase in speed; and that every effort was made to stop the train as soon as the conductor saw the peril in which deceased had placed himself. Evidence was also offered by plaintiff to the effect that at the time of the accident there was in approved use on some street-railroads in the county an appliance beneath cars, known as the "Johnson fender," which was a protection to passengers and train-employés who might fall between the cars. This fender was not in use on these cars. Whether this contrivance was in approved use, and whether it would afford protection, was disputed. Evidence was given supporting both theories.

Eight instructions were given the jury at request of plaintiff. Some of these are very lengthy, and we will only undertake to consider the principles of law involved in them, without setting them out in full.

1. It may be said, in the first place, that reversible error was committed in an instruction given plaintiff on the question of contributory negligence. By this instruction the jury was told "that the law presumes every man to have been

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using due care for his own safety, and that presumption is not overthrown by the mere fact of his being injured; that, to overcome the presumption of such due care, there must be evidence of carelessness and negligence on his part." There was evidence before the jury tending to prove contributory negligence. Every circumstance from which the death resulted was before the jury, and it was for them to determine therefrom whether the negligence of deceased was a contributing cause. Such an instruction has been disapproved in several recent cases. *Moberly v. Railroad Co.*, 98 Mo. 183, *Rapp v. Railroad Co.*, 106 Mo. 428, *Myers v. City of Kansas*, 108 Mo. 487.

2. It is difficult from the petition to tell whether the pleader intended to count upon negligence of defendant as a common carrier of passengers, or upon negligence in the mere management and operation of its cars. It is clear, however, that the case was tried upon the theory that deceased was a passenger, and entitled to the high degree of care a carrier owes to a passenger. This is shown by the evidence introduced by plaintiff, and by the instructions asked by her, and given by the court. The theory of the defense is that deceased never became a passenger, and its duty to him was only that of proper diligence to avoid injuring him when his danger became apparent. Evidence was offered by defendant with a view of sustaining its theory.

The court, at the request of plaintiff, gave this instruction: "(3) The jury should determine from all the evidence whether Joseph Schepers attempted to take passage on one of defendant's trains of cars, and, if they so find, whether said defendant, or any agent, officer, servant or employé of defendant, whilst running, conducting, and managing the car or train upon which he attempted to take passage, failed to exercise the utmost diligence, care, and foresight of very cautious persons under like circumstances; and the absence or want of such diligence, care, and foresight would render the defendant liable, if Joseph Schepers came to his death thereby, if the jury believe and find from all the evidence that said Joseph Schepers used ordinary care for his own safety." It will be seen that this instruction required, as a test of defendant's duty, the high degree of care due from a common carrier to a passenger under its protection. Indeed, the instruction goes even beyond the limit of care required of

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carriers of passengers under the rulings of this court. *Furnish v. Railway Co.*, 102 Mo. 450, *Smith v. Railroad Co.*, 108 Mo. 249, 52 Am. & Eng. R. Cas. 483; *Jackson v. Railway Co.*, 118 Mo. 224.

From the measure of care required of defendant, it is manifest that the instruction was intended to apply to the relation of passenger and carrier. In effect, the jury was instructed that, if deceased "attempted to take passage on one of defendant's trains of cars," he thereby became a passenger. Defendant insists, not only that this test of what constituted the relation of carrier and passenger was improper, but that there was a total failure of proof that the relation was ever created. It must be conceded that there is difficulty, in many cases, in determining when the relationship of carrier and passenger begins, and what acts of the parties are sufficient to create it. The difficulty is greater in case the carrier operates a street-railway, having no regular stations, or station agents authorized to make contracts. In respect to such carriers, passage must be taken hastily, on the streets, at points prescribed by the rules of the carrier, or by the police regulations of the municipality. Yet one test applies alike to all, and that is the relation can only be created by contract between the parties, express or implied. There must always be an offer and request to be carried on one side, and an acceptance on the other. *Shear & R. Neg.* (4th Ed.) § 448; *Patt. Ry. Acc. Law*, §§ 210, 214; 2 *Am. & Eng. Enc. Law*, 742.

A "passenger" has been defined to be "a person whom a railway, in the performance of its duty as a common carrier, has contracted to carry from one place to another place for a valuable consideration, or whom the railway, in the course of the performance of that contract, has received at its station, or in its car, or under its care." *Patt. Ry. Acc. Law*, § 210. In our state, probably, the words, "for a valuable consideration," do not govern. *Buck v. Power Co.*, 108 Mo. 179, 18 S. W. 1090, and cases cited. But the case at bar does not require us to go into that phase of the law. It is true that an acceptance must, in many cases, be implied. When a street-car has stopped at a usual place for receiving passengers, an acceptance of all persons who are waiting to take passage must be implied, as it may be impossible for each to be separately recognized. So, "where a person intends to

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take passage on a street-car, and has hailed it for that purpose, and it has been stopped to enable him to enter, he is to be regarded as a passenger while he is in the act of carefully and prudently attempting to step upon the platform." Booth, St. Ry. Law, § 326; *Smith v. Railway Co.*, 32 Minn. 2.

It is well said by SMITH, P. J., of the Kansas City court of appeals, in speaking of the duty of a carrier by street-railway: "It is bound to see every passenger who attempts to get upon its cars while they are standing still, but they are not bound after the cars are in motion. The safety of the train and those who are already on board requires that the gripman should be on the lookout ahead, while the conductor should be occupied in collecting fares, receiving requests to stop, and the like, rather than looking to the safety of those who may attempt to get on board after the train has started." *Meriwether v. Railway Co.*, 45 Mo. App. 534.

The ordinances of the city and the rules of the defendant fixed the stopping places for receiving passengers at the far cross-walk of the streets. At these points those in charge of the cars are required to look out for persons desiring to take passage. If no one presents himself in time, and makes known a desire to take passage, the cars are not required to be stopped, and the employes in charge may give attention to their other duties. The cars would not have to be stopped for one desiring to take passage, if he failed to make his wishes known in time to enable them to stop at the proper place. It follows from what has been said that plaintiff did not become a passenger by a mere attempt on his part to board the car while in motion, as he declared by this instruction. There must have been some act on the part of the carrier indicating an acceptance. *Stager v. Railway Co.*, 119 Pa. St. 70, 33 Am. & Eng. R. Cas. 540.

3. Defendant insists further that there was a total failure of proof that deceased ever became entitled to the care due to a passenger, and, after a careful review of the evidence, we have reached the same conclusion. The evidence shows conclusively that deceased was not on the street when the motor car passed over the crossing, which was the proper stopping place for receiving passengers. When he came out of the saloon, according to the evidence most favorable to plaintiff, the trailer was passing over the crossing, and running three or four miles per

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prove relation
of carrier and
passenger.

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hour. Up to that time he had not been seen by the motorman or the conductor on either car. He ran southwardly, with one hand raised, in the direction of the motor car.

There was no evidence that he was ever seen by the motorman or the conductor on the trailer. No slacking of the speed of the train was shown, or other act indicative that the train would stop, or that he was accepted as a passenger. It was shown that the conductor on the motor car saw deceased when he got within from 5 to 10 feet of it. But there was no evidence that anything was done by this conductor indicating an intention to stop for him. Indeed, the complaint in the petition is that the conductor "willfully and negligently failed and neglected to ring the bell, or give any notice to the motorman that said Joseph Schepers was going to get on the train, or stop the cars." In spite of this neglect of the conductor and refusal to stop, on recognition of the right of deceased to take passage, he undertook to board the cars.

It might be a question, in a proper case, whether, in the circumstances, it was the duty of the conductor to have stopped the train, and whether, on a failure to discharge such duty, the carrier would not have been liable for a breach of its duty to the public. But that neglect did not make deceased a passenger, or justify his actions. He could not in this manner, by his own act alone, constitute himself a passenger, and thus secure the high degree due from a carrier to a passenger. *Baltimore Traction Co. v. State*, 78 Ind. 409, 58 Am. & Eng. R. Cas. 200, and cases cited. Under the evidence, we think the relation of carrier and passenger was never created.

4. Defendant also insists that the evidence shows conclusively that deceased was guilty of such contributory negligence as should bar a recovery. It cannot be said, **Boarding of moving electric car Contributory negligence.** a; a matter of law, that a person of the age, physical development, and experience of deceased would be guilty of contributory negligence in attempting to board a street-car moving at no greater speed than three or four miles per hour, though propelled by electric power. Making such an attempt would undoubtedly be evidence of negligence, but whether it was a contributing cause of the injury should be for the triors of fact to decide. The person making the attempt could only be held to assume the risk of injury from the ordinary movements of the car. *Booth, St.*

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Ry. Law. § 336; Briggs v. Railway Co., 148 Mass. 75, 37 Am. & Eng. R. Cas. 204. Morrison v. Railroad Co., 130 N. Y. 169.

5. In regard to the alleged negligence of defendant in failing to provide its cars with the Johnson fender, we may say that the evidence shows that said fender was designed solely for the protection of passengers and employes; and, as deceased was neither, defendant did not owe to him the duty of supplying it, unless it were found as a fact that such failure amounted to a want of ordinary care towards the general public in the management of the railway.

Duty to provide fenders.

Reversed and remanded. All concur.

ABSTRACTS OF RECENT DECISIONS

(2) **Who is a Passenger** [(2) p. 21].—*Fraudulent Evasion of Payment of Fare*.—Where one gets on a passenger train with the deliberate purpose not to pay his fare, and adheres to that purpose, or if, being on the train, and having money with him with which he could pay his fare, he falsely and fraudulently represents to the conductor that he is without means to pay his fare, and by means of such false representations induces the conductor to permit him to remain on the train without paying his fare, the relation of carrier and passenger, and the obligations resulting from that relation, are not thereby established between him and the company, and the company owes him no other duty than not to willfully or recklessly injure him, and this rule is not modified by McClain's Ann. Code Iowa, § 2022, which provides that "every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." *Condran v. Chicago, M. & St. P. R. Co.*, (U. S. Cir. Ct. App. 8 Cir.) 67 Fed. Rep. 522; *citing* *Railway Co. v. Brooks*, 81 Ill. 250; *Railroad Co. v. Michie*, 83 Ill. 431; *Railway Co. v. Beggs*, 85 Ill. 84; *Railroad Co. v. Mehlsack*, 131 Ill. 64. 41 Am. & Eng. R. Cas. 60; *McVeety v. Railway Co.*, 45 Minn. 269, 47 Am. & Eng. R. Cas. 471; *Robertson v. Railway Co.*, 22 Barb. 91; *Railway Co. v. Nichols*, 8 Kan. 505; *Prince v. Railroad Co.*, 64 Tex. 146, 21 Am. & Eng. R. Cas. 152; *Railway Co. v. Campbell*, 76 Tex. 175, 41 Am. & Eng. R. Cas. 100;

Abstracts of Recent Decisions

Who are Passengers

Way v. Railway Co., 64 Iowa 48; *Id.*, 73 Iowa 463, 34 Am. & Eng. R. Cas. 286.

Same.—*United States Mail Agent.*—An employé of the United States, while on a passenger train in the legitimate discharge of his duty as mail agent and postal clerk, under some contract between the railway company and the government as to carrying the mails, is a passenger and not an employé of the company. *Norfolk & W. R. Co. v. Shott*, (Va.) 22 S. E. Rep. 811.

Same.—*Person Attempting to Board Train.*—A person attempting to board a train which was accustomed to stop at a station for the purpose of leaving passengers and not for the purpose of receiving passengers, who fails to make known his intention to board the train, is not a passenger so as to entitle him to recover for injuries sustained while attempting to get on board. *Jones v. Boston & M. R. R. Co.*, (Mass.) 39 N. E. Rep. 119; *citing Webster v. Railroad Co.*, 161 Mass. 298, 58 Am. & Eng. R. Cas. 1; *Dewire v. Railroad Co.*, 148 Mass. 343, 37 Am. & Eng. R. Cas. 57; *Merrill v. Railroad Co.*, 139 Mass. 238.

Same.—*Same—Instructions.*—An instruction in an action against a railroad company to recover for personal injuries, which in effect declares that if the plaintiff got on the steps of the car which caused the injury, for the purpose of getting upon the platform as a passenger with the intention of paying his fare when called upon, he became a passenger without regard to the fact as to how, when, or where he got upon the step of the car, and which wholly ignores the fact whether or not the defendant ever agreed to accept plaintiff as a passenger, or did any act indicating an intention to accept him as such, is erroneous. *Schafer v. St. Louis & S. R. Co.*, (Mo.) 30 S. W. Rep. 331.

Same.—*Person on Freight Train in Violation of Rule.*—A regulation disallowing passengers on a freight train is a reasonable one, and the conductor of such a train, in the absence of assumed or proven authority, is not to be presumed as authorized to disregard it; and if, instead of assuming such authority, the conductor in fact tells a person desiring to take passage that he did not have the authority, and is then induced by such person to take him on the train in violation of such rule, and disregard of his obligations to the company, such person does not thereby become a passenger, or entitled to the rights of a passenger, but is a trespasser, and takes the risk of injury as such. *Louisville & N. R. Co. v. Bailey*, (Tenn.) 29 S. W. Rep. 367.

In this connection the court said: "The rule in this, as in many other states, is that if one take passage on a train or in a car not provided for passengers, without being advised that he is not permitted to ride on such train or car, he may recover for injuries sustained as a passenger while so riding. *Washburn v. Railroad Co.*, 3 Head, 638. But the rule is different if he has no right so to believe, or is informed to the contrary. *Railroad Co. v. Meacham*, 91 Tenn. 428; *Trotlinger v. Railroad Co.*, 11 Lea. 533, 13 Am. & Eng. R. Cas. 49; *Railroad Co. v. Brooks*, 81

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Ill. 245; Railroad Co. v. Moore, 49 Tex. 31; Railway Co. v. Campbell, 76 Tex. 174, 41 Am. & Eng. R. Cas. 100; McVeety v. Railway Co., 45 Minn. 268, 47 Am. & Eng. R. Cas. 471.

Same—Person Riding on Hand-car by Unauthorized Permission of Employés.—In the absence of a showing of any authority on the part of employés to allow a boy to ride on a hand-car, or of any showing that the custom of employés to allow persons so to ride, was known to and acquiesced in by the officers of the company, it is not liable for injuries sustained by a boy so riding, where it appears that by one of the rules of the company its employés were forbidden from granting such permission. *Houston, C. A. & N. R. Co. v. Bollong*, (Ark., July 14, 1894) 27 S. W. Rep. 492.

Same—Invitation to become Passenger.—A superintendent of construction who requests a bridge superintendent, in the course of his employment, to go to a point on the line where the construction is incomplete, does not on behalf of the company invite the bridge superintendent to become a passenger. *Evansville & R. R. Co. v. Barnes*, 137 Ind. 306.

Same—Bridge Superintendent Riding over Uncompleted Road.—Therefore a superintendent of bridges who sues the company as an employé for injuries occasioned while riding on a portion of the road not completely constructed cannot contend that he was a passenger on the train, and as such entitled to all the privileges of a passenger holding a ticket. *Evansville & R. R. Co. v. Barnes*, 137 Ind. 306.

Same—Section Hand Riding on Street-railway Car.—But it has been held that a section man of a street-railway company, while riding upon one of its cars by the direction of his foreman, is not a trespasser although he pays no fare. *Denver & B. P. R. T. Co. v. Dwyer*, 20 Colo. 132.

Reasonable Regulations.—[(3) p. 22]—**Exaction of Extra Fare when Paid on Train.**—A railroad company cannot impose as a penalty for not purchasing a ticket such a sum that the fare collected on the train, including such additional amount, will exceed the maximum allowed by law. *Zagelmeyer v. Cincinnati, S. & M. R. Co.*, 102 Mich. 214, citing *Railroad Co. v. Skillman*, 39 Ohio St. 444, 13 Am. & Eng. R. Cas. 31; *Chase v. Railroad Co.*, 26 N. Y. 523.

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(1) Carrier of Passengers—What Constitutes—Obligations of—Must Furnish Equal Advantages to All.—A common carrier of passengers is one who undertakes for hire to carry all persons, indifferently, who may apply for passage. It is not necessary that the fare shall be paid in advance, or tendered, to establish the relation and reciprocal duties of carrier and passenger; it is enough that it is understood that

fare is to be paid. *Nashville, etc., R. Co. v. Messino, 1 Sneed. (Tenn.) 220.*

A railroad company in engaging in the business of common carrier undertakes that its road is in good traveling order and fit for use, and that the engines and carriages employed are properly constructed and furnished according to present state of art, and if an injury results from the imperfection of the road, the carriages, or engines, the company is liable, unless the imperfection was of a character in no degree contributable to its negligence. Railroad companies are bound also for a due obligation on the part of their servants and agents for necessary attention in seeking to secure the safety of the passengers, and they are liable for all injuries which may occur from negligence or want of skill of agents, if such injury might have been avoided by the utmost degree of care and skill on the part of such agents and servants. A railroad company is also liable for any casualty which may occur from running with greater speed than is prudent, or on account of collisions with obstructions which the engineer or other servant saw or might have seen, or which he might have avoided by the most skilful and prompt use of all the means in his power. *Id.*

A common carrier of passengers has at common law no right, in the performance of his public services of transportation, to make or give any undue or unreasonable preference or advantage to, or in favor of, any person, nor to subject any person to any undue or unreasonable prejudice or disadvantage, in respect to terms, facilities, or accommodations; and such carrier is liable for damage caused by a violation of this duty. *McDuffee v. Port. & R. R. Co., 52 N. H. 430.*

The opinion in this case is unusually lucid and exhaustive in its treatment of the right of passengers to equal facilities and accommodations, and as to the right of a railroad company to make the usual distinction in its rates of tariffs for service. Upon these questions the court used the following language: "As no one can infringe the common right of travel and commercial intercourse over a public highway, on land or water, by making the way absolutely impassable, or rendering its passage unreasonably unpleasant, unhealthy, or unprofitable, so also a common carrier cannot infringe the common right of common carriage, either by unreasonably refusing to carry one or all, for one or for all, or by imposing unreasonably unequal terms, facilities, or accommodations, which would practically amount to an embargo upon the travel or traffic of some disfavored individual. And, as all common carriers combined cannot directly or indirectly destroy or interrupt the common right by stopping their branch of the public service while they remain in that service, so neither all of them together, nor one alone, can, directly or indirectly, deprive any individual of his lawful enjoyment of the common right. Equality, in the sense of freedom from unreasonable discrimination, being of the very substance of the common right, an individual is deprived of his lawful enjoyment of the common right when he is subjected to unreasonable and injurious discrimination in respect to terms, facilities, or accommodations. * * * Whether the denial is general by refusing to furnish any transportation whatever, or special by refusing to carry one person or his goods; whether it is direct by expressly refusing to carry, or indirect by imposing such

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unreasonable terms, facilities, or accommodations as rendered carriage undesirable; whether unreasonableness of terms, facilities, or accommodations operates as a total or a partial denial of the right; and whether the unreasonableness is in the intrinsic, individual nature of the terms, facilities, or accommodations, or in their discriminating, collective, and comparative character, the right denied is one and the same common right, which would not be a right if it could be rightfully denied, and would not be common, in the legal sense, if it could be legally subjected to unreasonable discrimination, and parceled out among men in unreasonably superior and inferior grades at the behest of the servant from whom the service is due.

"The commonness of the right necessarily implies an equality of right, in the sense of freedom from unreasonable discrimination; and any practical invasion of the common right by an unreasonable discrimination practised by a carrier held to the common service is insubordination and mutiny, for which he is liable, to the extent of the damage inflicted, in an action of case at common law. The question of reasonableness of price may be something more than the question of actual cost and value of service. If the actual value of certain transportation of one hundred barrels of flour, affording a reasonable profit to the carrier, is one hundred dollars; if, all the circumstances that ought to be considered being taken into account, that sum is the price which ought to be charged for that particular service; and if the carrier charges everybody that price for that service, there is no encroachment on the common right. But if, for that service, the carrier charges one flour merchant one hundred dollars, and another fifty dollars, the common right is as manifestly violated as if the latter were charged one hundred dollars, and the former two hundred. * * * The common and equal right is to reasonable transportation service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal, in a certain narrow, strict, and literal sense; but that is not a reasonable service or a reasonable price which is unreasonably unequal. The question is not merely whether the service or price is absolutely unequal, in the narrowest sense, but also whether the inequality is unreasonable and injurious. There may be acts of charity; there may be different prices for different kinds or amounts of service; there may be many differences of price and service, entirely consistent with the general principle of reasonable equality which distinguishes the duty of a common carrier, in the legal sense, from the duty of a carrier who is not a common one in that sense. A certain inequality of terms, facilities, or accommodations may be reasonable, and required by the doctrine of reasonableness, and, therefore, not an infringement of the common right. It may be the duty of a common carrier of passengers to carry under discriminating restrictions, or to refuse to carry those who, by reason of their physical or mental condition, would injure, endanger, disturb, or annoy other passengers; and an analogous rule may be applicable to the common carriage of goods. Healthy passengers in a palatial car would not be provided with reasonable accommodations if they were there unreasonably and negligently exposed by the carrier to the society of small-pox patients. Sober, quiet, moral, and sensitive travelers may have cause to complain of their accommodations if they are unreasonably exposed to the companionship of unrestrained, intoxicated, noisy, profane, and abusive passengers, who may enjoy the discomfort they cast upon others. In one sense, both classes, carried together, might be provided with equal accommodations; in another sense, they would not.

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The feelings not corporal, and the decencies of progressive civilization, as well as physical life, health, and comfort are entitled to reasonable accommodations. * * * To allow one passenger to be made uncomfortable by another committing an outrage, without physical violence, against the ordinary proprieties of life and the common sentiments of mankind may be as clear a violation of the common right and as clear an actionable neglect of a common carrier's duty as to permit one to occupy two seats while another stands in the aisle. Although reasonableness of service or price may require a reasonable discrimination, it does not tolerate an unreasonable one, and the law does not require a court or jury to waste time in a useless investigation of the question whether a proved injurious unreasonableness of service or price was in its intrinsic or in its discriminating quality. The main question is not whether the unreasonableness was in this or in that, but whether there was unreasonableness, and whether it was injurious to the plaintiff."

Every person in a passenger-railroad car is, *prima facie*, presumed to be there lawfully as a passenger having paid, or being liable when called upon to pay, his fare, and the *onus* is upon the carrier to prove affirmatively that such person is a trespasser. *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 215.

It is well settled that so long as a common carrier has convenient room, he is bound to receive and carry all unobjectionable persons who offer themselves for transportation, if they arrive at a reasonable time before the departure of the conveyance. *Bennett v. Dutton*, 10 N. H. 481.

(2) *Carrier and Passenger—What Constitutes the Relation.—Passenger Defined.*—A passenger, in the legal sense of the word, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier as to the payment of fare, or of what is accepted as an equivalent therefor. *Pennsylvania R. Co. v. Price*, 96 Pa. St. 256, 1 Am. & Eng. R. Cas. 234.

A person who is traveling by a passenger train, and is not connected with the railroad company in a business capacity, is legally presumed to be a passenger and to be traveling for a consideration paid by him. *Creed v. Pennsylvania R. Co.*, 86 Pa. St. 139.

One who has a railroad ticket and is present to take the train at the ordinary point of departure is a passenger, although he has not yet entered the cars. *Central R. & Banking Co. v. Perry*, 58 Ga. 461.

Same—Payment of Fare or Entry into Cars not Essential.—Neither the actual payment of a fare nor an entry into the cars upon a railroad is essential to create the relation of carrier and passenger. Being within the waiting-room of the company, waiting to take the cars, is as effectual to make one a passenger as if he were within the body of a car. *Gordon v. Grand St. & N. R. Co.*, 40 Barb. (N. Y.) 546.

Payment of fare is not absolutely essential to constitute one a passenger. *Ohio & Miss. R. Co. v. Muhling*, 30 Ill. 1.

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Upon this question the court had this to say: "It is, however, urged that the plaintiff had paid nothing for his passage. This can make no difference, as the company had the right to demand the fare at the time he came upon the road, and upon failing to pay might have put him from the cars. Or they might have afterwards collected it, or, if the company was indebted to him, * * * they could have deducted it from that indebtedness. But even if they were carrying him gratuitously it could make no difference. *Gillwater v. Madison & I. R. Co.*, 5 Ind. 339; *P. & R. R. Co. v. Derby*, 14 How. (U. S.) 468. When a person is upon a train under such circumstances, the only inquiry is whether he was lawfully there, and if not, whether he paid his money for the privilege. So that in point of fact it can make no difference in this case whether the plaintiff in error had paid for his passage, or whether he was there by permission to be carried without compensation, as it does not appear that he was there unlawfully."

The actual purchase of a ticket or the entering of a car is not always necessary to constitute the relation of passenger and place upon the railroad company that degree of care which a common carrier owes a passenger. *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa 264.

In this case, in applying the foregoing rule, it was shown that the plaintiff entered the waiting-room provided by the railroad company for the convenience of passengers, and informed the depot or ticket agent of her desire to take transportation; that she in good faith placed herself under his direction, and that he directed her as to the manner in which she was to get on a caboose car on which she was to take passage, and this in itself was held sufficient to justify the jury in finding that the relation of passenger existed.

A purchaser of a ticket with the intent to ride thereupon is to be considered a passenger while going from the ticket office to take his seat in the cars, and is entitled to the rights of a passenger from the time of the purchase of a ticket. *Warren v. Fitchburg R. Co.*, 90 Mass. 227.

Same — Travelers on Freight Trains—How Far and when Passengers.—Railroad companies, although they are carriers of passengers by their passenger trains, are not to be regarded as common carriers of passengers by their freight trains, unless they make such carriage an habitual business. *Murch v. Concord R. Corp.*, 29 N. H. 2.

A person who enters the saloon car of a freight railway train, and when the train starts, without being requested or directed to leave, remains there as a passenger, contrary to the rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first class passenger, is entitled to the rights of a passenger. *Dunn v. Grand Trunk R. Co.*, 58 Me. 187.

(3) Rules and Regulations—Right of Carriers of Passengers to Make Same.—A railroad company may make and enforce by its agents reasonable and necessary rules for the transaction of its business, and for the proper and orderly conduct and management of its depot and other buildings open to the public. These rules, however, must be reasonable and such as do not necessarily infringe

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upon the rights of the public and others having or carrying on business in connection with railroad traffic and travel. *Summit v. State*, 8 Lea (Tenn.) 413; *Evans v. Memphis & C. R. Co.*, 56 Ala. 246, 9 Am. & Eng. R. Cas. 302.

It is the duty of a railroad company to adopt such regulations as are required to secure the comfort and safety of passengers, and it is equally the right of such company to adopt all reasonable rules necessary to the security and orderly management of its business. *State v. Goold*, 53 Me. 279.

Whatever rules tend to the comfort, order, and safety of the passengers on a railroad, the company is authorized to make and enforce. But such rules must always be reasonable and uniform in respect to persons. *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185.

The rules of a carrier of passengers must not only be reasonable, but they must not conflict with any legal liability or exempt the carrier from liability for negligence or improper conduct. *Norfolk & M. R. Co. v. Wysor*, 82 Va. 250, 26 Am. & Eng. R. Cas. 234.

The question of the reasonableness of regulations of a railway company affecting third persons, is generally a mixed question of law and fact; and it is more proper to submit such a question to the jury under instructions. *Bass v. Chicago & N. W. R. Co.*, 36 Wis. 450.

Same—Passengers must Take Notice of, and are Bound by, Reasonable Regulations.—It is the duty of a person about to take passage on a railway train to inform himself when, where, and how he can go and stop, according to the regulations of the railroad company, and if he makes a mistake, not induced by the company, against which ordinary care in this respect would have protected him, he has no remedy against the company for the consequences. *Beauchamp v. International & G. N. R. Co.*, 56 Tex. 249, 9 Am. & Eng. R. Cas. 307; *citing* *Ohio & Miss. R. W. Co. v. Applewhite*, 52 Ind. 540; *Pittsburg, Cin. & St. L. R. W. Co. v. Nuzum*, 50 Ind. 141; *Cheney v. The Boston & M. R. R. Co.*, 11 Met. (Mass.) 121; *Boston & Lowell R. R. Co. v. Proctor*, 1 Allen (Mass.) 267; *Jowanson v. The Concord R. R. Co.*, 46 N. H. 213; *Cleveland & C. R. R. Co. v. Bartram*, 11 Ohio St. 457; *Dietrich v. Pennsylvania R. R. Co.*, 71 Pa. St. 436; *Chicago & C. R. R. Co. v. Randolph*, 53 Ill. 510.

Purchasers of tickets are bound to comply with all reasonable rules and orders of the company or its agents, as much when going to the cars from the station-house, or from the cars to a place of safety beyond the railroad track, as they are when actually on board a train during transit. *Warren v. Fitchburg R. Co.*, 90 Mass. 227.

All passengers who knowingly disregard the rule requiring tickets to be purchased before taking passage upon a freight train is upon the same footing with one who refuses to pay fare, and may be expelled at any regular station. *C. & C. R. Co. v. Betram*, 11 Ohio St. 417; *Illinois Central R. Co. v. Nelson*, 59 Ill. 110.

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or fast trains running regularly on its road shall stop only at certain designated stations or places. And it is the duty of a person about to take passage on a railroad train to inform himself when, where, and how he can go or stop according to the regulations of the railroad company. *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 34 Am. & Eng. R. Cas. 290; *citing* *Railway Co. v. Swarthout*, 67 Ind. 507; *Henry v. Railroad Co.*, 76 Mo. 288, 12 Am. & Eng. R. Cas. 136.

If the purchaser of a railroad ticket has notice of the reasonable regulations of the company for the running of its trains, or if the railroad company had given public notice of such regulations in the ticket office and by posters in the cars, that a person of ordinary intelligence, by the use of reasonable care and caution, would or might obtain all requisite information, he then is bound by the regulations. *Trotlinger v. East Tenn., V. & G. R. Co.*, 11 Lea (Tenn.) 533, 13 Am. & Eng. R. Cas. 49.

And a railroad company does not waive its rights under such regulation by the fact that the conductor punched and took up a ticket, after having told the holder that under the regulations of the company the train did not stop at his place of destination as called for by the ticket, the ticket-holder being on a train which, according to the schedule, did not stop there. *Id.*

Same—What Regulations are Reasonable.—A regulation of a railroad company by which one car on each passenger train is set apart, primarily, for the use of women and men traveling with them is, considered as a question of law, proper and reasonable. *Bass v. Chicago & N. W. R. Co.*, 36 Wis. 450; *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185.

A regulation forbidding hackmen, expressmen, and loafers from coming within the passenger depot is reasonable. *Cincinnati v. State*, 8 Lea (Tenn.) 413, 9 Am. & Eng. R. Cas. 302.

In *O'Brien v. Boston & W. R. Co.*, 81 Mass. 20, it was held that a regulation of a railroad corporation that conductors shall eject passengers refusing to pay their fare, and not afterwards accept their fare if offered after the cars have stopped, is within the authority conferred upon such corporations by the Rev. Stats. ch. 39, § 83, which vests in railroad companies the right to establish all needful and proper regulations, and such regulation may be given in evidence in defense of an action against them and their conductor for ejecting a passenger for nonpayment of fare.

A railroad company has the right to prescribe reasonable conditions for the admittance of way passengers upon its freight trains: and payment of fare to its office agents or procuring a ticket prior to taking passage on such train is not an unreasonable condition. *Cleveland, C., C. R. Co. v. Bartram*, 11 Ohio St. 457.

A railroad company has a right to make a regulation requiring all passengers to purchase tickets before taking passage in a caboose car attached to a freight train, and to enforce this rule by ejecting

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all persons not having tickets. *Law v. Illinois Central R. Co.*, 32 Iowa 534, *T. P. & M. R. Co. v. Paterson*, 63 Ill. 304

A rule of a railroad company that "passengers will not be carried on way trains unless they are provided with tickets, way trains will not stop at stations where tickets are not sold to receive nor to let off passengers," is a reasonable regulation. *Lake Shore & M. S. R. Co. v. Greenwood*, 79 Pa. St. 373.

A railroad company may forbid the transportation of freight and passengers on the same trains, or may require passengers traveling on freight trains to procure tickets before entering the car; but in such case reasonable facilities for procuring tickets at or about the time of the arrival or departure of the trains must be afforded, according to the established usage of all railroads. *Evans v. Memphis & C. R. Co.*, 56 Ala. 246.

A regulation that two through passenger trains running daily each way between Chicago and St. Paul should not stop at the small stations south of Elroy, there being two other passenger trains there each way between Chicago and Elroy which do stop at such stations, is reasonable; and the fact that one of such trains had occasionally stopped at one of such stations will not estop the company from at other times running the train in the ordinary way, or make it a duty to stop there on any particular occasion. *Plott v. Chicago & N. R. Co.*, 63 Wis. 511, 21 Am. & Eng. R. Cas. 319.

It is a reasonable regulation of a railroad company to fix rates and fares by a tariff posted in its stations, and to allow a uniform discount on these rates to those persons who purchase tickets before entering the cars. *State v. Goold*, 53 Me. 279.

A regulation of a railroad corporation that a passenger who shall purchase a ticket before entering its cars shall be entitled to a discount from the advertised rates of the fares, but if such ticket is not purchased the full rate of the fare shall be charged, is a reasonable regulation and does not violate a rule prescribed by statute that the rates of fare shall be the same for all persons between the same points. *Swan v. Manchester & L. R. Co.*, 132 Mass. 116, 6 Am. & Eng. R. Cas. 327. *Citing* *Com. v. Power*, 7 Met. (Mass.) 596; *Johnson v. Concord Railroad*, 46 N. H. 213; *St. Louis, A. & T. H. R. v. South*, 43 Ill. 176; *Illinois Cent. R. v. Johnson*, 67 Ill. 312; *Indianapolis, P. & C. R. v. Rinard*, 46 Ind. 203; *Du Laurens v. St. Paul & P. R.*, 15 Minn. 49.

The fact that the ticket office is closed does not raise a presumption that the regulation to sell tickets at less than the rate paid on the cars is discontinued. *Du Laurens v. First Division, St. P. & P. R. Co.*, 15 Minn. 49.

While railroad companies may discriminate in their regulations between the amount of fare where a ticket is purchased and where the fare is paid upon the train, they have no right to discriminate between persons by selling tickets to some and refusing others. Therefore, a proper person, who has duly applied for a ticket and

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has been refused without just cause, has the same right to be carried, upon paying or offering to pay the ticket rate of fare, as if he had in fact previously purchased his ticket. *Indianapolis, P. & C. R. Co. v. Rinard*, 46 Ind. 293.

HANSLEY (Frank)*v.***JAMESVILLE AND WASHINGTON R. CO.**

(115 N. Car. 602.)

Tickets and Fares—Contract of Carriage [(1) p. 108]—**When Begins.**—A contract of carriage by a railroad company begins when a passenger comes upon its premises or conveyance for the purpose of buying a ticket in a reasonable time, or after having purchased a ticket; and the relation once constituted continues until the journey contracted for is concluded and the passenger has left or has had a reasonable time to leave such premises. (*Page 27*).

Breach of Contract of Carriage—Measure of Damages.—The amount recoverable for a breach of a contract to transport a person on a railroad train is limited to the damage supposed to have been in contemplation of the parties and actually caused by the breach, and the measure of the damages is ordinarily not materially different whether the defendant fails to comply with the contract from inability or willfully disregards it. (*Pages 32, 37.*)

Same—Same.—When a passenger is delayed or carried contrary to the agreement so as to lead to a failure to accomplish the object of the trip, he is entitled to recover at least the sum paid for the ticket, the interest thereon, together with compensation for the whole of the time lost in the trip, and in some instances the reasonable cost of reaching his destination by means of some other conveyance. (*Page 32.*)

Same—Punitive Damages.—Whether a passenger sues for a breach of the contract of carriage or in tort for the disregard of the duty of the carrier to the public, unless it appear that in addition to the expense, loss of time, etc., some personal injury accrues directly from the willful failure to transport him according to the schedule time, or some indignity is sustained by such failure, he is not entitled to punitive damages. (*Pages 32, 34.*)

Same—Same—Excursion Ticket.—A railroad company which by reason of defective equipment fails to return to the starting place a person to whom it has sold an excursion ticket is not liable to punitive damages, where the only injury complained of is inconvenience, delay and disappointment, and no bad motive on the part of the company is alleged against it. (*Page 35.*)

CLARK, J., *Dissenting.*APPEAL from Beaufort county superior court. *Reversed.**J. H. Small and W. B. Rodman*, for appellant.*Chas. F. Warren*, for appellee.

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PER CURIAM.—We are of the opinion that the plaintiffs in the above cases are not entitled to punitive damages. An opinion will be filed hereafter.

New Trial.

(September Term, 1894.)

EVERY, J.—As this controversy grows out of an admitted failure on the part of the railway company to perform its agreement with a passenger to carry him to and from a particular place within a given time, and involves especially the question whether the testimony warranted the court in instructing the jury that they were at liberty to add exemplary damages to the estimated loss actually sustained by reason of the delay, it is not improper to state in the outset several leading principles of the law governing the relative rights and duties of carriers and passengers, and the rules generally applicable in the assessment of damages in such cases.

Opinion.

The contract of carriage begins when the passenger comes upon the carrier's premises, or upon its means of conveyance, with a purpose of purchasing a ticket within a reasonable time, or after having purchased a ticket. The relation, once constituted, continues until the journey expressly or impliedly contracted for has been concluded, and the passenger has left the carrier's premises, or has been allowed a reasonable time to leave such premises. 2 Am. & Eng. Enc. Law., pp. 742–745.

Beginning of
contract of
carriage.

There is always, on the creation of a relation, an agreement express or implied, and a legal obligation to perform the stipulation of the contract by transporting the passenger in accordance with the published schedule, or within a reasonable time. Hutch. Carr. § 603 *et seq.* If an action be brought for a breach of this contract, the amount recovered is limited (with the single exception of a breach of marriage contract, say many law writers) to damage supposed to have been in contemplation of the parties, and actually caused by such breach. The measure of damage is ordinarily not materially different whether the defendant fails to comply with his contract through inability, or willfully disregards it. We shall have occasion presently to advert to the distinction between actions of tort founded upon a willful omission of a common-law duty, but involving at the same time a breach of

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contract, and such as are brought to obtain redress for the intentional failure or absolute refusal to comply with the terms of an agreement.

Actionable negligence must be the proximate cause of a legal injury and damage. It may be (1) a pure tort; (2) an inadvertant breach of contract, which cannot be regarded as independent of the contract and tortious; (3) a breach of contract in the nature of tort, and which may be treated as such independent of the contract. 5 Am. & Eng. Enc. Law, *supra*.

Treating of torts of this third class, Bish. Noncont. Law, § 74, says: "Because a common carrier, whether of goods or passengers, is a sort of public servant, the law imposes its duties upon him, a breach whereof is a tort, although there is a contract which is violated by the same act." Whenever there is a public employment from which arises a common-law duty, an action for a breach of such duty may be brought in tort. *Express Co. v. McVeigh*, 20 Grat. 264; *Clark v. Railroad Co.*, 64 Mo. 440; *Shear. & R. Neg.* § 22. In actions *ex delicto*, the motive of the defendant becomes material. 1 Suth. Dam. § 373. If a tort is committed through mistake, ignorance, or mere negligence, the damages are limited to the actual injury received. 5 Am. & Eng. Enc. Law, p. 21, note 3. But where there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act causing the injury, punitive damages are allowed, said the court in *Holmes v. Railroad Co.*, 94 N. C. 318, 26 Am. & Eng. R. Cas. 190, but the statement of the rule was modified by omission of the term "gross negligence" in the subsequent cases of *Rose v. Railroad Co.*, 106 N. Car. 170, and *Tomlinson v. Railroad Co.*, 107 N. Car. 427, 47 Am. & Eng. R. Cas. 620. The modification mentioned was due to the fact that this court meantime had said, in *McAdoo v. Railroad Co.*, 105 N. C. 149, that "the most learned and discriminating text-writers concur in the opinion that, in actions arising *ex delicto*, there can be no degree of negligence that can be described by the word 'gross' alone. But, where an injury is due and can be traced directly to the wilful act of another, he is not absolved from liability to the injured party. * * * Hence we often find, in opinions which have emanated from this and other courts, the expression 'gross and wanton negligence'; but the former word is never used to describe a degree of carelessness

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that will excuse the fault of the plaintiff in exposing himself to danger, except when it is improperly held synonymous with 'wilful,' 'malicious,' or 'fraudulent.' "

Thompson, in his work on Carriers and Passengers (page 573, § 27), says: "Such damages are termed 'exemplary,' 'punitive,' or 'vindictive,' sometimes called 'smart money,' and are only awarded in cases where there is an element of either fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness, or other causes of aggravation in the act or omission causing the injury. * * * Some of the authorities include 'gross negligence' as one of the elements which entitles the plaintiff to exemplary damages." But the better view is given in an opinion delivered in a recent case in the supreme court of the United States. In reviewing that case Mr. Justice DAVIS, who delivered the opinion, said: "Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence." *Railway Co. v. Armstrong*, 91 U. S. 489. The general rule, therefore, is that, where the violation of duty makes the defendant a wrongdoer, only compensatory damages are allowed, while proof of a wrongful purpose may take a case out of it as an exceptional one. Fraud, malice, or insult imply from their very definitions the existence of an intent on the part of the wrongdoer to cheat, to injure through hatred, or to oppress. Where even the rightful ejection of a passenger is accompanied with undue force, "rudeness, recklessness, or other wilful wrong" (*Rose v. Railroad Co.*, *supra*), the law assumes the existence of bad motive on the principle applicable in ordinary cases of assault,—that every person is presumed to intend the natural consequences of his own act. *Tomlinson's Case*, *supra*.

It must be noted that Mr. Thompson carefully excludes "gross negligence" as an element warranting the allowance of such damages, and substitutes the expression "such a degree of negligence as indicates a reckless indifference to consequences," which is equivalent to wanton carelessness; yet the learned justice who wrote the opinion in *Holmes' Case*, *supra*, inadvertently cited that author (94 N. Car. 323) in support of his statement of the doctrine. In the consideration of the case at bar, therefore, it is proper to dismiss from our minds the idea that the weight of authority, in our own court or else-

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where, leaves us at liberty to hold that punitive damages may be awarded in every instance where a court can, by giving a very comprehensive meaning to that undefined and improper term, "gross negligence," as descriptive of the degree of carelessness, classify a case as an exceptional one, taken out of the general rule by the evidence of intent.

Counsel for the defendant asked the court, on the trial of the case at bar, to charge as follows:

“(1) That upon the complaint, and the facts as stated in the complaint, in the absence of any allegations of wilful or gross negligence, the plaintiff is not entitled to recover punitive damages.”

(2) “That, taking the entire evidence in view, the plaintiff is not entitled to recover punitive damages.”

* * * (4) “That if the plaintiff knew, when he contracted for transportation to Jamesville and return, of the general character, quality, and condition of the defendant’s equipment, and the general condition of its road, plaintiff would be entitled to recover no damages except the cost of transportation back to Washington.”

(5) “That, the cause of action being laid in tort, the plaintiff cannot recover damages for a breach of contract of carriage in this action.”

(6) “That, upon the entire evidence, the jury should respond to the several issues in favor of the defendant.”

(7) “That, if the defendant was expending the entire income from its road in the maintenance of its roadway and the equipment of said road, it is not guilty of such wilful negligence as will subject it to punitive damages, but the plaintiff can only recover such actual damages as may have been proved.”

The court refused to give these instructions asked, but charged the jury among other matters, as follows: “(2) The plaintiff claims that he bought a ticket from Washington to Jamesville, and back to Washington; that the defendant negligently failed to have a train to bring him back; and also punitive damages for the wrongful act of the defendant in failing to bring him back. He alleges that the defendant has wilfully failed and neglected its duty to the public in not properly keeping its roadbed, tracks, engines, and cars in such condition as to do the business which it naturally gets; and

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if you are satisfied that the defendant has wilfully neglected to do this, and in consequence of this wilful negligence they failed to run the engines and cars to return the plaintiff to Washington, then he would be entitled to punitive damages; otherwise, he will only be entitled to compensatory damages." The court also charged the jury that it was the duty of the defendant to have known the condition of its road and cars; and if they found that the roadbed, track, and engines of defendant were, at the time alleged, in such condition as not to render it reasonably certain, in the ordinary running of its trains, that the engine would be able to carry the trains through, etc., it would be wilful negligence, for which they might allow punitive damages.

It appeared from the testimony that the road was originally constructed for the purpose of hauling lumber, but ultimately engaged in the business of transporting passengers across the intervening swamp from its northern terminus, at Jamesville, to its southern terminus at Washington. The roadbed had been made by driving down piles of various kinds to make a foundation for the cross-ties. In the earlier years of its operations, as a carrier of passengers, the company had owned two engines, one regular narrow-gauge passenger car, and one passenger car constructed out of a street-car; but the latter car had become unserviceable some time before the injury complained of, and on extraordinary occasions a flat or box car had to be used to accommodate passengers. The engines had become worn, and had been jolted and injured on account of the bad condition of the roadbed and the consequent jarring in passing over it. The earnings of the road had been applied exclusively to its improvement during the whole period of its use as a road for transporting passengers, but latterly the income had been greatly diminished, and was insufficient to keep the roadbed in repair, much less to provide additional cars or engines. These are some of the facts testified to by the witnesses.

The gravamen of the complaint is that the defendant company carried the plaintiff from Washington to Jamesville, November 7, 1892, but failed to furnish means of transportation at the stipulated time, November 9th, to bring him back to Washington on his return ticket. In applying the abstract principles which we have stated more specifically to the case

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before us, we find it to be a well-settled rule that where a
 • **Breach of** passenger is delayed or carried contrary to the agree-
contract of ment, so as to lead to a failure to accomplish the
carriage— object of the trip, such person is entitled to recover
Measure of in all cases at least the sum paid for the ticket, with
damages. interest thereon, together with compensation for the whole of
 the time lost in the trip, and in some instances the reasonable
 cost of reaching the objective point by means of some other
 conveyance. *Young v. Railroad Co.*, 1 Cal. 353; *Hamlin v.*
Railroad, 1 Hurl. & N. 408; *Railroad v. Banaud*, 58 Ga.
 180; *Hawcroft v. Railroad*, 8 Eng. Law & Eq. 362; *Sears*
v. Railroad, 14 Allen, 433; *Eddy v. Harris*, 78 Tex. 661, 47
 Am. & Eng. R. Cas. 473; *Walsh v. Railway Co.*, 42 Wis. 23.

The rule of damage just stated is to be adopted, not only
 when the suit against the railway company is brought for, or
 the proof confined to, the breach of contract of carriage, but
 as well where the plaintiff elects to sue in tort, and
Form of rely upon the disregard of duty on the part of the
action. carrier as a cause of action, unless it appear that
 the plaintiff has suffered, in addition to the expense, loss of
 time, and inconvenience incident to every failure to comply
 with such a contract, some personal injury of which the wil-
 ful failure to transport him according to the schedule time is a
 proximate cause. 5 Am. & Eng. Enc. Law, 40; *Railway*
Co. v. Armstrong, supra; *Railroad Co. v. Sellers*, 93 Ala. 9;
 3 Suth. Dam. §§ 934-938; *Martin v. Railroad Co.*, 32 S. Car.
 592; *Wilkinson v. Searcy*, 76 Ala. 176; *Shear. & R. Neg.*
 § 23.

In *Railroad Co. v. Sellers, supra*, where the conductor car-
 ried a female passenger beyond the station to which the com-
 pany had contracted to carry her, and ordered her off the train
 in a driving rain with an infant in her arms, and so incum-
 bered with baggage that she could not protect herself by using
 an umbrella, thereby subjecting her to exposure, from which
 she contracted sickness that lasted for three weeks, the court
 carefully and in express terms rested the decision that the jury
 might allow exemplary damages upon the ground, not of the
 "omission of the duty" on the part of the conductor of
 stopping at the station, but of his wilful disregard of her com-
 fort and health in forcing her to expose herself and her infant
 instead of letting her off at a house or backing the train to the
 station.

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In discussing this doctrine, Sutherland (volume 3, § 938) says: "Where a person has bought a ticket, and is carried beyond the station for which he is ticketed, without any fault on his part, he has a right of action for at least nominal damages, though he suffers no actual injury, and for such actual injury as he may in fact suffer." After laying down the foregoing as the ordinary rule, when the conductor, with a full knowledge of the destination of a passenger, merely takes him beyond that point, and lets him off without circumstances of aggravation, he proceeds to refer with approval to the ruling of the court of Alabama, already cited, that where there was evidence, in addition, that a female passenger was ordered off the train with her infant, the circumstances attending her expulsion were evidence to be considered by the jury of wilful wrong on the part of the conductor, and consequent liability on the part of the company to punitive damages. It is an error that will lead to endless confusion to hold that "smart money," which is allowed as a punishment to the wrong-doer, may be recovered in every case where, under the common-law practice, an action *ex delicto* would lie. *Wanamaker v. Bowes*, 36 Md. 42; *Wilkinson v. Searcy*, *supra*; *Phelps v. Owens*, 11 Cal. 22. All of the actions brought against railway companies for breach of duty arise out of tort; but it is only in those where the elements already mentioned as indicative of bad motive exist, and where, in addition, some personal injury or indignity is sustained, that the plaintiff is allowed to recover more than compensatory damages. *Morse v. Duncan*, 14 Fed. 396.

In *Tomlinson v. Railroad Co.*, *supra*, the court said: "The fact that the plaintiff was wrongfully expelled places him in no more favorable attitude, as a claimant of punitive damages, than if he had been rightfully ejected, but in an unlawful or unwarranted manner. It is an essential prerequisite, to the acquisition of the right to recover exemplary damages for wrongful expulsion of a passenger from a train, that there should be evidence of undue force, unnecessary rudeness in the application of the force or insult, malice, or some wilful wrong accompanying the act of ejecting him or causing him to leave the train." *Rose v. Railroad Co.*, *supra*, and authorities there cited. Justice Clark, for the court, in *Wallace v. Railroad Co.*, 104 N. Car. 452, 41 Am. & Eng. R. Cas. 212; approving the rule laid down in 3 Suth. Dam. (1st. Ed.)

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261, said: "Plaintiff is to have a reasonable satisfaction for loss of both bodily and mental powers, or for actual suffering both of body and mind, which are the immediate and necessary consequences of the injury." "In the absence of any sufficient testimony to make the company liable for wilful disregard of the intestate's danger," said the court in *Roseman v. Railroad Co.*, 112 N. Car. 719, 52 Am. & Eng. R. Cas. 638, "we think the court below erred in submitting the case to the jury."

It is true that smart money may be awarded by the jury when no actual, but only nominal, damage is shown, as when
Punitive damages. a conductor rightfully expels a person from a car, or the owner puts a trespasser off his premises, and either of them uses excessive force or subjects such person to useless indignity. *Tomlinson v. Railroad Co.*, *supra*; *White v. Barnes*, 112 N. Car. 323. The allowance is made, in these instances, on account of the assault or rudeness. But, where a trespass is committed by mistake, the case is not governed by the same principle as when a wilful assault is committed. *Beveridge v. Welch*, 7 Wis. 465. It is not sufficient ground for allowing punitive damages that the defendants, when they committed a trespass, had reason to believe, but did not know, that their acts were wrongful, and might result in injury to plaintiff. *Inman v. Ball*, 65 Iowa, 543. On the other hand, a trespasser is always responsible for such actual damages as legitimately follow from his act, whether he contemplated the result or not (*Allison v. Chandler*, 11 Mich. 542), while one who assaults another is presumed to have intended the personal injury,—that is, the consequence of committing the assault; it being a wrongful act, done purposely and without cause. *Goetz v. Ambs.*, 27 Mo. 33; *U. S. v. Taylor*, 2 Sumn. 586; Fed. Cas. No. 16,442; *Causee v. Anders*, 4 Dev. & B. 240.

We think that the case at bar is one of those where the plaintiff, under the old common-law practice, might have elected to bring his suit either for the breach of contract in failing to bring the plaintiff back on schedule time, or for the disregard of his duty to the public as a carrier,—either an action of *assumpsit* or of trespass. But because he chose then to sue for the tort, and now to allege such facts as show an omission of duty, it does not follow that, upon proof of such allegations, exemplary damages will be allowed. There has

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been a failure to show the sort of wilfulness that manifests its presence in malice, rudeness, violence, indignity, and reckless disregard of consequences, and there is no evidence that the plaintiff suffered from sickness contracted by exposure incident to the delay, or was subjected, in consequence of the defendant's failure to furnish transportation, to any other personal injury or to indignity.

If neither the intentional and wrongful expulsion of a passenger not accompanied with undue force (Tomlinson's Case, *supra*), nor the negligent carrying him beyond his destination (3 Suth. Dam. § 938), after having inspected his ticket or received it, is sufficient evidence of the wilful infliction of personal injury to warrant the allowance of punitive damages, we fail to see upon what principle we can hold a railroad company liable to be so punished because, with a full knowledge on the part of its manager that the company had but two engines, one of which was in the shop at Norfolk for repairs, it undertook to haul to Jamesville and back, with the other, not then in good condition, the train on which the plaintiff and others who had return tickets were to be carried as passengers, because only of the delay and inconvenience incident to such detention. If the same engine, in consequence of the bad condition of the track or the engine itself, had, with the cars, been derailed, only those passengers who received bodily injury could have maintained actions against the company, and have recovered, as a part of the compensation for the consequences of the accident, exemplary damages. It is not necessary to cite authority in support of the soundness of so plain a proposition; and yet, if we sustain the court below, the logical result would be that a passenger who is delayed without suffering bodily injury by a defective engine is entitled to smart money, though he could not have subjected the company to such punishment had he escaped unharmed when it was derailed and upset. "Neither negligence without damage nor damage without negligence will constitute any cause of action." Shear, & R. Neg. §§ 23-25.

The case of Purcell v. Railroad Co., 108 N. Car. 414, seems to have been confidently relied on to sustain the contention of the plaintiff. The facts in that case were that the plaintiff had purchased a ticket, and was waiting at the time at which it was advertised that the train would stop at the

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station where he was to embark; but, the cars being overloaded because a circus was to give an exhibition at the station to which the passenger was destined, the conductor did not stop at the station, but left him standing. It was held that the failure to provide sufficient means of transportation, when by reasonable diligence it could have been ascertained that they would be needed, was such evidence of wilfulness and gross negligence as to warrant the court in instructing the jury that they might allow punitive damages. In the opinion, *Heirn v. McCaughan*, 32 Miss. 17, was cited as "exactly in point" to sustain the ruling, though even that extreme case was distinguishable from *Purcell's Case*, as well as that at bar, in that the jury must have found, preliminary to the assessment of exemplary damages, (1) that, after advertising that the boat would stop for passengers at the landing where the feme plaintiff was waiting, the owners or their agent wilfully and capriciously passed by, when they could have effected a landing there, and had room to accommodate the plaintiff; (2) that the instruction excepted to and sustained was that the plaintiffs were entitled, "from the exposure and discomfort they suffered" in waiting for the boat, to exemplary damages (page 24); it appearing on the trial that the feme plaintiff was pregnant, and that, the weather being unusually cold, she suffered great pain and anguish, whereby her health and life were in peril.

In addition to the authorities already cited upon this point, we find a summary of the doctrine compiled from leading cases in *Ray, Neg. Imp. Dut.*, p. 228, § 68, which is as follows: "Where, according to the schedule of trains, a passenger arrives at a station, intending to take passage, and he finds no train ready, and is compelled to remain over the night, and in consequence of the delay he fails to keep an appointment and complete business arrangements, while he will be entitled to recover the actual expense incurred in his hotel, he cannot recover beyond more than normal damages,"—citing *Railroad Co. v. Green*, 52 Miss. 779, to sustain the proposition; and the court say in that case, on page 229, that "punitive damages will not be allowed in the absence of any circumstances of malice, oppression, insult, personal injury, mental and physical suffering, although sometimes more than actual damages may be awarded against common carriers by way of punishment for their neglect of duty, and as a protection to the

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public." In the application of the proposition which is taken from that case, the court held that where a passenger-train ran 60 yards beyond the platform, and failed to stop there long enough for a passenger who had bought a ticket, and was waiting to embark, to reach it, the allowance of \$1500 damages was excessive because "no damages were proved except disappointment, delay and inconvenience."

The reasonable rule adopted in Mississippi will not, therefore, apply either to Purcell's Case or to that at bar, since no personal injury was sustained by the complainant in either case, nor was there any ground for compensatory or punitive damages shown, except the disappointment, delay, and inconvenience resulting from the failure to furnish means of transportation.

We conclude, therefore, that the plaintiff was not entitled, upon any phase of the evidence to recover punitive damages, for the reasons (1) that he has not proved that he sustained any personal injury, or shown any grounds for asking damages except inconvenience, delay, and disappointment; (2) that in no aspect of the testimony is there evidence of bad motive sufficient to entitle the plaintiff to more than compensatory damages.

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damages.

In passing upon this question we must invoke the aid of common sense and common observation, since the question whether a given act amounts to negligence at all, and, if it does, what degree of culpability attaches to it, depends not only upon surrounding circumstances, such as the condition of the parties, but the condition of the country and the progress of improvement in science and the arts. We cannot shut our eyes to the history of railways in North Carolina, and the daily developments of the country by new branch lines, built first for the transportation of lumber, and gradually extending their business, as carriers, to other freight, until at last, though the corporation has been able to purchase not more than two or three engines and a single passenger-car with few appointments, its patrons induce it to transport passengers in order that they may have the advantage of saving time and expense by substituting such a conveyance as an improvement on a road-wagon or other vehicle. We are not disposed to check the process of evolution which we see around us, from a lumber road into a comfortable line for passengers, as the development of business justifies the change.

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Even where a road appears to be retrograding, we see no reason why we should interpose with a harsh rule, such as would have stopped the operation of the Raleigh & Gaston Road nearly 50 years ago with the best efforts of our distinguished Governor Graham, representing the state, as a principal stockholder, and running it with poor equipments and constant danger of injury to passengers by derailments and snakeheads, and frequent delays of many days to purchasers of tickets. History has repeated itself in the gradual improvement of the roadbed and equipments of the Western North Carolina Railroad. If the axe is to be brought to the root of the tree by stopping these roads from transporting persons at all unless the conditions be improved, the legislature has wisely attempted to vest the necessary power in a railroad commission, to accomplish this end either by ordering a cessation of operations, or the improvement of the roadbed and the purchase of new equipments. Meantime, neither the law, fairly interpreted, nor considerations of public policy, warrant the adoption of so harsh a rule as that proposed.

It necessarily follows that Purcell's Case is overruled as inconsistent with the principles we have laid down. We are less averse to taking this course, because the doctrine there enunciated can never become a rule upon which the title to property depends, and, as we have intimated already, because it may operate in its enforcement to check the improvement and development of sections now too remote from market to justify the most costly roadbeds and the best equipments. For the reasons given, we deem it unnecessary to discuss the other exceptions, which we may state, in a general way, are untenable, and we feel constrained to grant a new trial.

CLARK, J.—(dissenting). It is the duty of railroad companies to run their trains according to schedule. "Passengers, if delayed, are entitled to compensation for loss of their time (*Railroad Co. v. Books*, 57 Pa. St. 339), with their expenses during delay, or when necessary, expenses of procuring another conveyance. As to compensation for loss of time, * * * it is admissible to prove the rate of wages at the place of destination." 2 Harris, Dam. Corp. § 545. "A passenger, in order to avoid delay, can only incur a reasonable expense. He cannot take a spe-

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cial train in order to avoid a slight delay. * * * The value of time lost may also be recovered. Evidence of the rate of wages earned by persons of plaintiff's trade at the place of detention is admissible to guide the jury in fixing the damages." 2 Sedg. Dam. §§ 862, 863. Such are the general principles applicable in cases where, by reason of the train being behind the schedule time, the passenger misses connection with the first train on a connecting road, or is delayed even in reaching his destination on the carrier's own line according to the advertised schedule, when the action is for breach of contract. As, in every such case of delay, each passenger is entitled at least to nominal damages, it is of importance to the public and the common carrier to revert to the settled principle, in actions for breach of contract,—that the parties are only liable for those damages which were reasonably in their contemplation at the time of making the contract. This is the usual limit of damages, but there may be cases where the neglect of the carrier is so wilful as to make it liable in an action of tort for punitive damages.

The plaintiff, however, contends that, as the present is an action of tort upon the evidence, he is entitled to recover exemplary damages. The question was decided by this court, no one dissenting, in *Purcell v. Railroad Co.*, 108 N. C. 414, where it is said (pp. 417, 418): "The Code (section 1963) provides: 'Every railroad corporation shall * * * at regular times to be fixed by public notice * * * take, transport and discharge such passengers and property * * * on due payment of the freight or fare legally authorized therefor and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises.' For a violation of such statutory duty the plaintiff might have sued in contract (*Hodges v. Railroad Co.*, 105 N. Car. 170), but he could elect to sue in tort for the injury and the breach of public duty, existing independent of the statute, by the wilfulness or negligence of defendant (*Bish. Noncont. Law*, §§ 73, 74; *Redf. Carr.* § 422; *Tattan v. Railroad*, 2 El. & El. 844). If the tort was committed by mere negligence of the defendant, as simple carelessness or inadvertence, the plaintiff would be restricted to compensatory damages, and as no special damages were alleged and shown, other than obtaining another conveyance, the measure of damages as laid down by the court, to wit, the price of procuring such other convey-

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ance, would have been correct; but if the conduct of the defendant was wilful, or showed such gross negligence as to indicate a wanton disregard of the rights of the plaintiff, he was entitled to recover punitive damages in addition."

In the present case there was evidence of great dilapidation of cars, rolling stock, engines, roadbed, and trestles, and of continued neglect to repair same. So gross was it that for defendant to continue to offer to transport and to receive for transportation passengers, with such defective machinery and roadway, was such a disregard of its duties and the rights of the public that, in case of death resulting to a passenger while en route, there are authorities which would have sustained an indictment for manslaughter against the president, directors, and other chief officers. It is very certain that, with such machinery and roadbed, to contract to take the plaintiff and others on a round trip, and, having gotten them to the other end of the line, to leave them there to get back as they could, was such "gross and wilful disregard of plaintiff's rights as would entitle him to recover punitive damages."

As was said in *Purcell v. Railroad Co.*, *supra*: "Should an excessive verdict have been found by the jury, the discretion rested with the trial judge to correct it; but it would be a denial of justice to permit a common carrier to exhibit such arbitrary and wilful neglect of the duties it has assumed, and such disregard of the rights of others. Yet such is the effect, if, without adequate excuse, it should be allowed thus to act with no other penalty than refunding the price of the ticket, and the price paid for another conveyance, since the latter would be demanded in very few cases, and only when the destination is at a short distance. * * * The refunding of the price of the ticket would in most cases amount to nothing, as the passenger would usually buy a ticket by the next train; yet the inconvenience, annoyance, and injustice to the traveling public by such detention would be great, and difficult to estimate." In that case the plaintiff sued for damages because the train ran by its regular station without stopping to take him on. Here the condition of the machinery and roadbed was such that it was dangerous to travel over the road. The defendant company showed a criminal indifference to the rights of the public in offering to transport passengers when it knew the uncertainty alike of safe transportation and on

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schedule time, both of which are implied in its offer. The company owed it to the public to keep its appliances and roadway in proper condition to transport safely and according to schedule. If it had not money in the treasury, it should have borrowed it, and, if unable to do that, it should have suspended operations, as we learn it has since done.

It is not every case where a railroad is in a bad condition, and there is delay or failure to convey, that the jury can give punitive damages. The court here told the jury that "if the defendant had reason to believe, and did believe, from the business of the road for several years past and the condition of its engines, that it would be able to keep its contract to transport plaintiff, and an accident occurred which they could not have, in the ordinary course of their business, foreseen and provided for, it would not be wilful negligence." To this the defendant did not except.

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The court further charged, if the jury "found that the roadbed, track and engines of defendant were, at the time alleged, in such condition as not to render it reasonably certain, in the ordinary running of its trains, that the engines would be able to carry the trains through, or the roadbed and track in such condition as to render it unsafe to carry its trains over it, and they permitted this condition of things to continue up to the alleged time, it would be wilful negligence, for which you may allow punitive damages. If you find that they had allowed their road, track, and engines to get in such condition as not to be able to do the ordinary business of the road by their negligence, and the character of that negligence was such as to satisfy you that defendant did not care, or was indifferent, as to whether they had the train there or not, it would be wilful negligence." To this the defendant excepted.

The action was brought for a tort. The second paragraph of the complaint was as follows: "(2) That the defendant so carelessly and negligently conducted and managed the said railroad, and so carelessly and negligently allowed its track, cars, locomotives, and other appurtenances belonging to the said railroad as a common carrier to become so out of repair, and the equipment of the said railroad to become so run down and incomplete, and so negligently failed to provide adequate facilities for the transportation of passengers, that the plain-

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tiff, by reason of the premises, having on the 7th day of September, 1892, purchased at the town of Washington a ticket to the town of Jamesville and return,—to return on the 9th day of September, 1892,—and for which the defendant charged and received from the plaintiff the sum of one dollar, was carried over the railroad of the defendant company to the town of Jamesville; that upon the said 9th day of September, 1892, at the advertised time plaintiff presented himself at the defendant's depot in Jamesville, N. C., for transportation over said railroad to Washington, N. C., and because of the negligence, carelessness, and lack of proper equipment of a railroad receiving the profit of a common carrier and owing duties to the public, and without fault on the part of the plaintiff, defendant failed to provide locomotive, cars, or other means for the transportation of, and failed to transport, this plaintiff to the town of Washington, according to its public duty and advertisement, to plaintiff's damage five hundred dollars." And one of the issues submitted was: "Did the defendant negligently suffer and permit its road, rolling stock, and equipment to become in the condition described in section 2 of the complaint, so that it was unable to discharge its duties to the public as a common carrier of freight and passengers?"

The above charge was therefore appropriate to the controversy in the pleadings, and it was most amply supported by the testimony. It will be seen by reference thereto that the roadbed, the engines, and the rolling stock were all unfit and dangerous to be used; that the manager of the company reported the condition of the same to the owners in Philadelphia, but that in wilful disregard of their public duties they neither put the road, engines, and rolling stock into fit condition, nor discontinued holding themselves out to the public for the safe and regular carriage of passengers. If such conduct as the evidence described was not such wilful disregard of the defendant's duties to the public as will entitle the plaintiff to recover punitive damages, it will be absolutely impossible for a railroad company in this state to show that "wilful disregard of its duties and indifference to the rights of the public" as will, under all the authorities, make it liable for punitive damages. The damages recovered was \$50.

Upon the evidence, the defendant has cause to congratulate itself that it is not defendant in an action for damages for

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death or personal injuries caused by its gross and wilful negligence, or that its officers are not under indictment for manslaughter. This is not a breach of contract of carriage by a private party; but it is the direct result of a long-continued disregard of duties assumed in regard to the public by a corporation which sought and obtained the exercise of the right of eminent domain to furnish it a right of way and other special privileges. These were granted solely in consideration of the services which the defendant undertook to render to the public, but which it has wilfully and grossly neglected to properly render. The defendant's own evidence was that its manager had repeatedly, time and again, notified the president and directors of the dilapidated and dangerous condition of the machinery and roadbed, but that adequate relief had always been denied. In *Railroad v. Hurst*, 36 Miss. 660, it is said: "It is the right of the jury in such cases to protect the public by punitive damages against the negligence, folly, or wickedness which might otherwise convert these great public blessings into the most dangerous nuisances."

This disposes of the exception to the charge. The exception to the evidence that an engineer in defendant's employ a year previous was allowed to testify to the bad condition of roadway and machinery at that time cannot be sustained. This was competent, taken with the other evidence, to show the gross neglect of defendant in permitting the dilapidation to continue, all the while holding itself out to the public for the safe and regular carriage of passengers. The exception to issues is also without merit. Every phase of the controversy raised by the pleadings could be fairly presented upon the issues submitted. *Humphrey v. Board*, 109 N. C. 132, 37 Am. & Eng. Corp. Cas. 489.

BROOKS v. JAMESVILLE & WASHINGTON R. CO.

(115 N. Car. 624.)

EVERY, J.—Though a critical examination of the assignments of error shows that some of the instructions given to the jury, and excepted to by defendant, were erroneous upon different grounds, yet we deem it best to hold that this case depends upon the principle announced in the opinion in *Hansley v. Railroad Co.*, (filed at this term) *ante*, page 26, in reference to the allowance of vindictive damages, and therefore we grant a new trial.

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ROBINSON (W. H.)

v.

SOUTHERN PACIFIC CO.

(Supreme Court of California, Oct. 6, 1894.)

Tickets and Fares.—Contract of Carriage [(1) p. 108].—**Rights of Passenger—Stop-over—Construction of Statute.**—Under section 490 of the Civil Code which provides that the purchaser of a railroad ticket may ride from the station at which a ticket is purchased to the point designated on the ticket as the destination, and from any intermediate station to the station of destination within a prescribed time after the purchase of the ticket, the purchaser may stop at an intermediate station, and within the time prescribed, from there, continue his journey to his destination. (*Page 46.*)

Same—Repeal of Statute by Implication.—Section 490 declares that the railroad company must provide, and on being tendered the rate of fare therefor fixed as provided in section 489, must furnish tickets, etc. *Held*, that the repeal of section 489 by article 12, § 22 of the constitution, which creates a railroad commission with authority to fix rates of fare, did not operate to repeal section 490 by implication, but merely superseded section 489. (*Page 48.*)

Rights of Passenger.—Alternative Ticket.—Rules.—A ticket in terms giving a purchaser the right to go to either of two designated places, at the same rate, confers the right to him to go to one of such places by way of the other, to stop over in the latter, and at any time within the prescribed statutory period, resume his journey without the payment of additional fare, notwithstanding that the company has a shorter and more direct route from the original point to the ultimate point of destination, and has promulgated a rule requiring passage thereto by the longer route to be continuous. (*Page 57.*)

Same—Same—Stop over.—The holder of such a ticket is not deprived of the right to stop over at an intermediate station by reason of a rule or custom of the company to issue alternative tickets, tickets by which the intermediate station is made a terminus. (*Pages 57, 61.*)

Right of Company Leasing from Company Prior to Adoption of Civil Code.—A railroad corporation organized under the provisions of the Civil Code is not exempted from the obligations thereby imposed upon it, by the fact that it is the lessee of a similar corporation organized prior to the adoption of the code, and not subject to its provisions. (*Page 52.*)

Disqualification of Judge.—A justice of the appellate court, who by marriage is a first cousin to one of the stockholders of the defendant company, is not related to one of the parties by affinity within the third degree, and consequently is not by section 170 of the Code of Civil Procedure, disqualified to sit in the case. (*Page 59.*)

APPEAL from San Francisco Superior Court. *Affirmed.*

Robinson v. Southern Pac. Co. Contract of Carriage

Foshay Walker and Baker, Wines & Dorsey (E. L. Craig, of counsel), for appellant.

C. M. Jennings (Thos. V. Cator and James G. Maguire, of counsel), for respondent.

GAROUTTE, J.—This action is brought to test the right of the holder of a railroad passenger ticket to stop at an intermediate station, and subsequently renew his journey on another train without further payment. Defendant is a common carrier of passengers, by ferry and railroad, between San Francisco and Oakland and Alameda. It has several lines between these points, and has provided and sells but one form of ticket from San Francisco to Oakland and Alameda. It is as follows:

S. P. Co.—Ferry and Local Trains.	
ONE PASSAGE ONLY CC 11	San Francisco 15 cts.
	OAKLAND or ALAMEDA
	8 <i>T. H. Goodman,</i>
	Gen. Pass and Ticket Agent.

This ticket entitles the holder to take either of three different lines, all operated by defendant, two of which pass through Oakland.

In May, 1891, plaintiff purchased such a ticket at the office of defendant at the foot of Market street, San Francisco, and proceeded with it to the ferry which carries the passengers to the Oakland pier in the city of Oakland, where defendant's railroad begins. He was required to pass through a gate on his way to the ferry. Here an employé of the defendant demanded his ticket. Plaintiff informed the gatekeeper that he desired to stop over at Oakland, and insisted upon retaining his ticket or receiving a check which would be evidence of his right. He was informed that stop-over tickets were not provided, and that no stop-over rights were allowed; and he was refused permission to go upon the ferry, except upon surrender of his ticket, which he then gave up. He proceeded by ferry and road to the intersection of Broadway and First

Facts.

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streets, in the city of Oakland, where he alighted, and remained attending to some private business for a short time. At this point all passenger-trains passing over the road habitually stop, and from 1000 to 1500 passengers get on and off daily. There is no station-house or station-agent there, but passengers are received, and pay their fare to the conductor. Subsequently, he took the train for Alameda at the point where he alighted, and, his fare being demanded by the conductor, he refused to pay it, basing his refusal upon the facts stated. But, notwithstanding his statement of these matters to the conductor, he was ejected from the train.

The only question involved in this litigation is, was the respondent entitled to a stop-over privilege at the city of Oakland? He claims this stop-over right under section 490 of the Civil Code, and that section reads as follows: "Sec. 490. Every railroad corporation must provide, and, on being tendered the fare therefor fixed as provided in the preceding section, furnish to every person desiring a passage on their passenger-cars a ticket which entitles the purchaser to a ride, and to the accommodations provided on their cars, from the depot or station where the same is purchased to any other depot or station on the line of their road. Every such ticket entitles the holder thereof to ride on their passenger-cars to the station or depot of destination, or any intermediate station, and from any intermediate station to the depot of destination designated in the ticket, at any time within six months thereafter. Any corporation failing so to provide and furnish tickets, or refusing the passage which the same calls for when sold, must pay to the person so refused the sum of two hundred dollars."

Civil code,
§ 490.

The briefs of counsel contain an elaborate discussion of various legal principles that are claimed to be germane to the question here presented, and those principles which we deem necessarily involved in the final determination of this litigation we will take up and discuss *seriatim*.

1. Appellant insists that the true construction of section 490 is: "Such a ticket entitles the holder, at any time within six months after the issuance of the ticket, to ride from the depot where he purchased the ticket to the depot of destination named in the ticket, or to any intermediate station, or, if he so elects, he may start from any intermediate station, instead of where he

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bought the ticket, and ride to the depot of destination designated in the ticket."

Notwithstanding the statute appears to be plain and explicit upon its face, it is insisted that the conjunctions "and" and "or" are convertible terms, and that the conjunction "and," as it appears in the section should be read "or." There are times when it is entirely manifest from the context that the intention of the lawmaking power can only be given effect by holding these terms convertible. And this rule of construction is adopted for the very purpose of giving that force and effect to the text which plainly appears from the context was intended to be given it by the author of its creation; but this license of construction is only to be exercised upon the lines indicated, and in all other cases these two words are to be read and constructed as they stand upon the page. Ordinarily, they are in no sense interchangeable terms, but upon the contrary, are used in the structure of language for purposes entirely variant. "There is a world of difference between the little words 'and' and 'or.'" *State v. Beaucleigh*, 92 Mo. 497. We see nothing here demanding the construction claimed. It is not plainly manifest that the legislature so intended. It is not manifest at all. The clause is full of meaning, reading it as it appears to the eye, and is entirely consistent with other portions of the section. If we should interpret "and" as "or" an entirely different meaning would be given the provision. This would be judicial legislation pure and simple.

Appellant contends for the construction claimed because it is said that formerly so-called "competitive points" were favored, and the object of the statute was the prevention of greater charges from intermediate stations to competitive points than were charged for longer distances from one competitive point to another. In view of the fact that the legislature provided in the immediately preceding section (489) that the amount of passenger fares should be regulated according to the distance traveled, there would seem to be no necessity for further legislation upon that question. That evil, whatever it may have been, was called to the attention of the legislature, and cured by said section. The only effect upon the statute, by appellant's construction, is to give a passenger the right to board a train at an intermediate station, and ride to the point of destination upon a ticket purchased at some sta-

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tion which, from the place of destination, is beyond the intermediate point. We see no demand for legislation of the character outlined by appellant's construction of the statute. The circumstance of a passenger purchasing a ticket from one point to another, and then only actually using it for a portion of the distance, would not seem to be an event of such common occurrence as to demand the needs of legislative action.

Again, while not desirous of prejudging matters not necessarily involved in the consideration of the present case, we might remark that no legal rule now presents itself to our minds which ever denied a passenger the right to use a ticket of the character here contemplated from an intermediate station to the point of destination. *Auerbach v. Railroad Co.*, 89 N. Y. 281. And, if such was the law prior to the passage of section 490, we are justified in saying that the legislature, in enacting that provision, was not doing an idle thing, and we must assume the provision was created for other purposes. Appellant's position as to the construction of section 490 of the Civil Code is not tenable.

2. It is insisted that section 490 of the Civil Code, upon which plaintiff relies for his stop-over right, was repealed by section 22 of article 12 of the state constitution, and this claim of repeal is based upon the additional claim that the constitutional provision cited places the full and exclusive power of fixing railroad transportation charges within this state in the railroad commissioners.

It is insisted that the repeal of section 490 is occasioned by the repeal of section 489; that this constitutional provision repealed section 489,—a section which pertains to the regulating and establishment of rates for freights and fares,—and that section 490 is so dependent upon section 489 that it cannot stand alone, and the fall of section 489 therefore necessarily carries with it the destruction of section 490.

We will not discuss the interesting question as to whether or not the repeal of section 489 was occasioned by the adoption of that portion of the constitution referring to the election, powers, and duties of railroad commissioners, but, for the purposes of the case alone, will concede that such repeal was had. The single question then remains, did the repeal of section 489 result in the repeal of section 490?

Chief Justice SHAW, in discussing a similar principle, said

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in the case of *Warren v. The Mayor, etc.*, 2 Gray, 84: "When the parts of a statute are so mutually connected and dependent, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently, if some parts are unconstitutional and void, all the provisions which are thus dependent, conditional, or connected must fall with them." The rule is well stated in the foregoing quotation, and the principle there declared has been recognized and declared the true one by the courts of many states. Measured by this doctrine, can section 490 stand the test? Is it manifest that the legislature intended that such section should stand or fall with section 489? Is section 490 so closely connected with and so entirely dependent upon the preceding section that its very life ends at the moment when that section is no more? Would section 490 have been enacted by the legislature if section 490 had never been placed upon the statute book? These interrogatories are answered by appellant, and to the legal soundness of those answers our attention shall now be addressed,

Section 489 provides that railroad corporations must fix and publish their rates of charges for freightage and fares from one depot to another on their various lines of road in this state, and declares a graduated scale of charges according to distance. It further provides that the maximum charges shall not exceed 10 cents per mile for each passenger, nor 15 cents per mile for each ton of freight transported over its road, and also affixes a penalty for the violation of any of these provisions.

Section 490 declares that the railroad company must provide, and, on being tendered the fare therefor fixed as provided in the preceding section, furnish to every passenger desiring passage on their passenger-car, a ticket which entitles the purchaser to certain rights and privileges which we have already considered; and this section also affixes a penalty for the violation of any of its provisions. In all portions thereof, save a single one, the section is entirely disconnected from and independent of section 489. With this single exception, it appears to be full of its own vitality, and possessed of ample strength within itself to stand out alone; a law as independent and complete as any other section within the lids of the Code.

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But, it is said in the language of defendant, to hold that section 490 is not dependent upon section 489, is to ignore the words of the section itself, namely, "on being tendered the fare therefor fixed as provided in the preceding section." This clause forms the connecting link between the sections, and upon the sole strength of that link depends the repeal or nonrepeal of section 490. It is claimed that it was the legislative intent that a passenger, in order to enjoy the rights and privileges granted by section 490, should tender the amount of fare fixed by the corporation, in accordance with section 489, and, that section being repealed, that it is impossible to make a tender of the fare therein provided; that a tender of the fare fixed by a later act of the legislature, or the tender of a fare fixed by the corporation itself in the absence of any law upon the subject, would be unavailing, and that consequently no rights and privileges can flow to the passenger under section 490. It is insisted, in other words, that the fare tendered must be the fare fixed according to section 489, notwithstanding that section may have been repealed, and in substance replaced by other legislation.

We think appellant's interpretation of the section, as evidenced by the foregoing line of reasoning, too rigid and literal to satisfy well-settled rules of statutory construction. The subject-matter of these two sections has nothing in common. The sections relate to distinct and independent matters of legislation. Section 489 is in no way dependent upon section 490. There is no mutuality in their connections and dependencies. Section 490 could have been repealed, and the vitality of section 489 would not have been affected in the slightest degree. In accord with appellant's contention, we have conceded that section 489 is repealed by implication by certain provisions of the constitution. In order to declare a repeal by implication, it must be entirely apparent, by a comparison of the two provisions, that the subject-matter of section 489 is completely covered by the constitutional provision, and the repeal can be supported upon no other ground. In other words, the constitutional provision is a substitute for the section.

It seems to follow that the question here presents itself in no different form, and involves no different principle, than though section 489 had been amended upon the lines embraced within the repealing clause of the constitution. If

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section 489 were still a live section, covering the general subject-matter embraced within it at the beginning, no matter how changed and modified, no matter how drastic the treatment by amendment, surely defendant would still be bound by its provisions. Hence, appellant's contention reduces itself to the single claim that the present law upon the question is not embraced in the "preceding section," and that the particular point of location of the law upon the statute book is the all-controlling element. Such a construction would result in the sacrifice of substance to the merest form.

The gist of section 489 is the requirement that railroad corporations fix their rates, and fix them in accordance with certain rules there declared, and within certain limits, and, to a certain extent, regulate fares and freights; and a reference to this section in section 490 is simply a recognition of that fact, and nothing more. The words, "as provided in the preceding section," might almost be termed surplusage. Their only possible purpose is to make more certain that which was already certain. Strike them from the section, and nothing of weight or substance is taken away. The construction would be the same with or without them. There surely is not that magic in them which holds the power of life and death over the entire section. The fare to be tendered, in order to give the passenger a right to his ticket, is the lawful fare; and it is immaterial whether that fare be fixed by the "preceding section," or by other provisions of the Code, or by the corporation in the absence of law, or by the constitution itself. It is the fare regulated by law, and, if there be no law regulating the fare, then it is the regular fare charged by the corporation.

At the date of the enactment of section 490, it happened that fares were regulated by the preceding section 489, and hence the reference. There is nothing to indicate that the enactment of these two sections partook of the character of a contract between corporations upon the one side, and the people, through its legislative body, on the other, whereby corporations were granted valuable privileges and benefits under section 489 in consideration of reciprocal valuable privileges and benefits extended to the traveling public under section 490. It is further apparent that such conditions did not surround the creation of these sections, for we find the substance of section 489 to have been the law of this state for many

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years prior to the adoption of the Codes. St. 1861, p. 625.

We conclude that it was not the intention of the legislature that these two sections should be taken as a whole, that section 490 should stand only while section 489 stood, and that the fall of section 489 should likewise mark the fall of section 490. We see no reason why the legislature should do such a thing, and such an intention is not manifest from the context. The repeal of section 489 does not result in the repeal of section 490.

3. The Central Pacific Company leased to the Southern Pacific Company certain railroads for the period of 99 years, and also assigned to the Southern Pacific Company certain leases it held of other roads. These leases included all the rolling stock, telegraph lines, steamboats, wharves, piers, and all other property, both real and personal, used in connection with these roads, together with the appurtenances thereto belonging, with the right to possess, use, maintain, and operate and enjoy said property. The leases held by the Central Pacific Company were assigned "with the right to take, hold, operate, maintain, and enjoy said railroads and other property in the same manner as the Central Pacific Company holds, operates, enjoys, and maintains the same under said leases."

It is now claimed that section 490 of the Civil Code, upon which plaintiff relies to give him the privilege of "stop-over," does not apply to the defendant, the Southern Pacific Company, because it does not apply to its lessor, the Central Pacific Railroad Company, and section 288 of the Civil Code is relied upon to show its nonapplicability to the Central Pacific Railroad Company. That section provides: "No corporation formed or existing before twelve o'clock, noon, of the day upon which this Code takes effect, is affected by the provisions of part IV of division first of this Code, unless such corporation elects to continue its existence under it as provided in section 287; but the laws under which such corporations were formed and exist are applicable to all such corporations, and are repealed subject to the provisions of this section."

The Central Pacific Railroad Company has not elected to continue its existence under the law found in part 4 of division 1 of the Civil Code; and, section 490 being found therein, it would appear that that corporation was not bound by its

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provisions, for this language is comprehensive, and, judged by its face alone, has no uncertain meaning. But it is claimed by appellant that section 490 is highly penal in its character. If this be true, the power of the legislature to create penal statutes, and thereupon enact that they should be only applicable to corporations created subsequent to a certain time, may well be doubted. Such an exception would appear to be beyond the limits of legitimate legislation.

This court said in the case of *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604: "A law is constitutional and general when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction. It is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." But we will not enter into a detailed examination of section 288, with the object of determining its true force and effect as to either of these positions. For the purposes of this case, we will concede that by reason of that section the provisions of section 490 do not apply to the Central Pacific Company. That much being conceded, is its lessee, the Southern Pacific Company, by virtue of its leases, assignments, etc., likewise unaffected by the provisions of that section?

The Southern Pacific Company is a foreign corporation, and was organized under the laws of the state of Kentucky in March, 1884,—more than 10 years after the enactment of sections 288 and 490 of the Civil Code; and, aside from any rights, privileges, or exemptions passing to it by virtue of these leases and assignments, it only exists in this state, and is enabled to do business in this state, by virtue alone of those provisions of the Code which, we have conceded, have no binding force and effect upon the Central Pacific Company. We are unable to appreciate the importance and gravity with which appellant surrounds its contention in this regard.

A corporation, organized and carrying on its business under a certain set of laws, leases and assigns all or portions of its property to another corporation, organized and carrying on its business under another and different set of laws. Do such leases, assignments, and transfers give the second corporation

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the right to thereafter conduct its business under the laws which were only applicable to the first corporation? Such contention can have no support in the law. Prior to its transactions with the Central Pacific Company, the Southern Pacific Company, in the conduct of its business, was bound by the provisions of section 490 of the Civil Code, and no man or corporation, by contract or otherwise, possessed the power to relieve it in the conduct of its business from whatever restrictions or burdens were imposed by that section.

These restrictions and burdens were imposed upon it by legislative power, and it is to that power alone it must look to be relieved of them. When organized and ready to do business in this state, part 4, division 1, of the Civil Code, formed the law regulating its conduct and defining its rights and duties; and now, by the sole virtue of a business transaction with another corporation, it is claimed that this entire body of law has become nugatory, and, in effect, repealed, as to such corporation. This law cannot be evaded in that way. It is not the legal method recognized for effacing a law from the statute books.

The Southern Pacific Company was organized to conduct a general railroad business. If it had built its own roads, it would have been bound by the provisions of section 490, and its status as to the law is not changed by reason of the fact that it preferred to lease rather than build. Let us assume that it has constructed and is the owner of certain roads in connection with those it has obtained from the Central Pacific Railroad Company.

The result follows that one distinct and separate body of law governs its conduct as to certain portions of its business, and other portions thereof are controlled by another separate and independent body of law. It needs but a glance at the various provisions of the Code to see that such conditions would lead to inextricable confusion. If appellant's position be sound, its converse is equally sound, and a transfer by the Southern Pacific Company of its roads (if it has constructed any) to the Central Pacific Company would bring that corporation within the binding effect of section 490, as well as all other provisions of part 4 of the Code, *nolens volens*. This practice would not only effect results never contemplated by the legislature, but would effect them in a way absolutely for-

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bidden by sections 287, 288, for those sections mark the only road that leads to such results.

It is not necessary that we enter into a microscopic inspection of the writings evidencing the contracts between these corporations, for the purpose of determining all the properties and rights that actually passed thereby. It is sufficient to say that some things are not the subject of lease. This lessor could not lease the law. The law could not pass under those instruments, however apt words were used to indicate such a purpose. The legislature extended to each of these corporations the right to conduct its business in a certain way. That right, in each instance, was embodied in a separate and distinct set of laws. It was a purely personal right. It was in no sense an asset of the corporation which could be bought and sold. It was nothing that could be transferred. If the Central Pacific Company could transfer it to the defendant, it could likewise transfer it to a private individual, and this would be an absurdity.

This right which is claimed to have passed to the lessee is a very intangible thing. It certainly is not the privilege which the lessor possessed of bringing itself within the provisions of the Code, for the lessee was already within those provisions. Prior to the lease the lessee was subject to the burdens of section 490. How any transfer of interest from the lessor could operate to relieve the lessee of burdens already resting upon it is not perceptible. Appellant terms this act an exemption. The only exemption the Central Pacific Company enjoyed was its exemption from the operation of general laws pertaining to corporations coming under the provisions of the Civil Code. It had the right to exist and do business under certain laws, but this right was not transferred to the defendant. It could not be transferred. The Central Pacific still exists and has the right to do business. It can build new roads (perchance, it did not dispose of all its old ones), and operate them as it has ever done in the past. If this right has been transferred, the corporation no longer exists, for it constitutes its life.

Neither is it possible that this right could be transferred *pro tanto*, nor that it may vest in both corporations at the same time. If section 490 does not apply to defendant, no part of the Code pertaining to corporations applies. We then have a corporation organized since the adoption of the Codes

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conducting its business under laws created prior to that adoption, and such a condition of things is directly opposed to the provisions of section 288. It would be the achievement of astonishing results by the practice of a legerdemain that has no place in the law, and the recognition of a doctrine striking at the very root and source of legislative power.

Appellant, in this respect, relies firmly upon the case of *Gilmore v. City of Utica*, 121 N. Y. 561. That was a street assessment case, and the judgment rendered in no way was dependent upon that portion of the decision here relied upon by appellant. The decision was not placed upon that ground, and the matter appears to have been but incidentally touched upon. The facts are briefly these: A street railroad corporation was organized and did business under a general law which provided that "every such corporation incorporated under, or constructing, extending or operating a railroad constructed or extended under the provisions of this act," shall pave between its tracks, and two feet on each side thereof. A second corporation, organized under a law containing no similar provision, leased its roads to the other corporation, and the court said: "But the Utica Belt Line Street-Railway Company (lessee) was not operating its road under that act. By a lease authorized by chapter 305 of the laws of 1885, it had succeeded to all the rights of the Utica Street-Railroad Company, and was operating the road in the right of that company, and hence that section has no pertinency."

We have not the laws of New York of 1885 before us, and consequently do not know exactly what may be the subject of lease under those statutes. If the language quoted goes to the length of holding that a lessee of a railroad corporation takes with the property leased the right to control and use it subject alone to the law operating upon the lessor corporation, we do not endorse it as sound. It would seem in this case that, as the road involved was not one constructed under the provisions of the act under which the lessee was incorporated, by the very terms of the act itself the lessee was not required to do the paving, and possibly the court viewed the question from that standpoint.

4. It is contended that section 490 has no application to this case, because the railroad begins at Oakland pier, within the corporate limits of the city of Oakland. Therefore, the point referred to in the complaint, instead of being an inter-

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mediate station, is the initial point, Oakland being the station at which the railroad begins, and there being no railroad between San Francisco and Oakland pier, but a ferry only. It seems very clear that, as to a trip from San Francisco to Alameda via Oakland, Oakland is an intermediate station; and the fact that the defendant has two or more stopping-places in Oakland, where, for the accommodation of the public, passengers are allowed to enter and leave its local trains, can make no difference. At whichever of these stopping-places a passenger chooses to get off, he stops at Oakland; and under the law, as we construe it, he has the right, if he has made a reasonable demand for the privilege, to afterwards resume his journey to Alameda. Right to stop-over.

5. It is next contended that the line traveled by plaintiff was not the most direct route, and that passengers are allowed to take the more circuitous route on condition that they make a continuous passage. It is sufficient for present purposes to say that the ticket purchased by plaintiff in this case was an unlimited ticket, and subject to no such conditions. Same.

For the foregoing reasons, it is ordered that the judgment and order be *affirmed*.

We concur: DE HAVEN, J.; HARRISON, J.; FITZGERALD, J.; BEATTY, C.J.

VAN FLEET, J.—I concur in the judgment. I think that section 489 of the Civil Code is, by clear and necessary implication, repealed by section 22 of article 12 of the constitution. But I am not strongly impressed with the position of appellant that section 490 is so dependent upon section 489, to which it refers, as that the repeal of the latter necessarily involved and carried with it the repeal of the former. I do not think there is any such dependence manifest from either the subject-matter or the provisions of those two sections. To my mind, the reference in section 490 to the preceding section is merely in its nature incidental, and not such a bond of union as to make the life of the one measure that of the other. The vital question in the case, in my judgment, and the one giving rise to the greatest difficulty, is whether section 490 was ever intended or designed by the legislature to give to the passenger a stop- Concurring opinion.

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over privilege, or the right to a stop-over ticket. Upon this question, after a somewhat extended examination of the case and the arguments presented, I am not prepared to say that the conclusion reached in this opinion of the court is not the correct one.

MCFARLAND, J.—I dissent, and, if other duties permit, will hereafter express my views of the case in an opinion. At present I will merely give my conclusions on two points:

1. I think that the ticket purchased by respondent, on its face, and especially when considered in connection with the reasonable regulations of appellant of its business on the various routes from San Francisco to Oakland, Alameda, and other points near the bay, which regulations were well known to respondent, merely gave to the latter the right to go either to Oakland or Alameda, not to both, and when he elected to get off at Oakland the life of the ticket was ended.

Dissenting
opinion.

2. A "stop-over" ticket is a thing well known, not only in railroad circles, but to the general public,—so well known as to have gone into the common dictionaries of the language. It is a ticket which gives one a right "to stop at a station beyond the time of the departure of the train on which one came, with the purpose of continuing one's journey on a subsequent train." Webst. Dict., under head "Stop." Now, section 490 does not use the phrase "stop-over," nor does it, in my judgment, use any equivalent words to denote an intention to give to the holder of an ordinary ticket the right to break up his trip into 2 or 20 different journeys on different days, and on 2 or 20 different trains.

I think that the authorities are to the point that a ticket which merely designates in general terms a trip from one point to another means a continuous trip between those points, and such is surely the law where there are by-laws or regulations of the railroad company to that effect, especially where they are known to the purchaser of the ticket. See *Com. v. Power*, 7 Met. (Mass.) 596, 41 Am. Dec. 478, *et seq.*; 1 Redf. R. R., p. 92 *et seq.*, and cases there cited; *Yorton v. Railway Co.*, 54 Wis. 234; *Cody v. Railroad Co.*, 4 Sawy. 114, Fed. Cas. No. 2940; *Gale v. Railroad Co.*, 7 Hun, 670. This being the general law, there is no language in section 490 sufficient to show an intent to change it so as to make

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all tickets stop-over tickets. There is no necessity of substituting "or" for "and" where it occurs in the section. The language of the section merely provides for a ticket upon which the holder can ride from the "station where the same is purchased" to the point of destination, and also from any intermediate station to the point of destination, but not that he may stop over at any intermediate station, or at all intermediate stations, and proceed afterwards, piecemeal, on other trains, as he may choose. Whether or not the intention was to remedy a certain subsisting evil, as contended for by appellant, there is clearly no intention expressed of providing for stop-over tickets.

There are other points in the case, as to some of which I agree with respondent, and as to others with appellant.

I think that the judgment should be reversed.

PER CURIAM.—In this case objection was made by respondent, at the oral argument, to the qualification of Mr. Justice VAN FLEET to sit in the case, upon the ground that he is related to one of the parties by affinity within the third degree, as provided by section 170 of the Code of Civil Procedure. The fact upon which the objection is based is that the said justice became by marriage, and is thus by affinity, a first-cousin, or cousin-german, of one of the stockholders of the corporation appellant. But such relation is not within the third degree.

Disqualifica-
tion of Judge.

Section 1393 of the Civil Code provides as follows: "In the collateral line the degrees are counted by generations from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins-german in the fourth, and so on." As no other rule is elsewhere declared in any of the Codes, and as the four Codes are to be construed as one statute (Pol. Code, § 4480), section 1393 must be taken as establishing the degrees of relationship by consanguinity or affinity, and other sections of the Codes referring to such degrees must be construed as passed in view of said section 1393. People v. De la Guerra, 24 Cal, 73, and one or two previous cases, were decided before the adoption of the

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Codes, and under the rule that statutes in derogation of the common law must be strictly construed. Section 4 of each of the Codes provides as follows: "The rule of the common law, that statutes in derogation of the common law are to be strictly construed, has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates."

We are satisfied, therefore, that Justice VAN FLEET is not disqualified to sit in this case, and the said objection is overruled.

VAN FLEET, J., did not participate in the foregoing.

ON REHEARING.

BEATTY, C.J.—The three principal questions arising in this case were very fully and elaborately argued by counsel, both orally and in the printed briefs filed prior to its submission, and they were as carefully considered in the opinion of the court heretofore filed, wherein it was held: First, that section 490 of the Civil Code is still in force; second, that it confers stop-over privileges upon the holders of the tickets therein provided for; and, third, that the defendant is subject to its provisions. As to these points our views remain unchanged, and nothing further need be said concerning them. The rehearing, indeed, was ordered with special reference to a question which, although it had been stated in the briefs, had not been discussed at the oral argument, and had been but slightly considered in the opinion of the court.

This question, to which the reargument was practically confined, may be briefly stated as follows: Did the plaintiff, by purchasing and accepting a ticket which in terms and in fact gave him the alternative right to go to Oakland or Alameda, become thereby entitled to go to Oakland, stop off there, and afterwards resume his journey to Alameda? When this question is considered in the light of the principles established by our former decision, and with reference to the facts stated in the opinion and other facts appearing in the record, it is of comparatively easy solution.

The defendant had a ferry and railroad line which it was operating between the foot of Market street, in San Francisco,

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and the city of Alameda, and which passed through the city of Oakland, where there was a station at which passengers were accustomed to enter and leave its cars. The fact that defendant had another and more direct line of road (and ferry) between the same termini did not relieve its statutory obligation to fix (either alone or in conjunction with the railroad commission) a regular passenger rate by the longer route.

The right to operate the road and the obligation to fix such regular rate are correlative. It had in fact complied with the statute, and fixed the rate at 15 cents, and this was well known, not only to the plaintiff but to the public generally. Such being the case, the plaintiff, desiring to go from San Francisco to Alameda via Oakland, tendered the regular fare, and demanded the ticket which it was the duty of the defendant to furnish. He received a ticket in the form set out in our original opinion, which was the only ticket the defendant was accustomed to issue to passengers desiring to go by either of two routes to Oakland or either of two other routes to Alameda. But the fact that the ticket gave the plaintiff his choice of these various routes and different destinations made it none the less effective as a ticket from San Francisco to Alameda via Oakland. What he wanted was a ticket of that particular kind, with all the lawful privileges thereto attached, and it was not in the power of the defendant to deprive him of such privileges by offering him other privileges in exchange.

This conclusion does not involve the consequences that are apprehended by counsel for appellant. We do not hold, and it does not follow, from the views herein expressed or from anything decided or said by way of argument in our original opinion, that there can be no ticket sold on any line of road which is not a stop-over ticket. We only hold that there must be a regular passenger rate established from one depot to another, and that a passenger who tenders the regular fare is entitled to a ticket to his place of destination, which ticket under the law gives him a right to stop Stop-over. over at an intermediate station. And the railroad company cannot demand the regular rate, and at the same time deny the privilege which the law confers upon all who pay it.

If in consideration of an abatement from the regular established rate a passenger voluntarily accepts an excursion or other limited ticket, an entirely different case is presented. Here the regular established fare was tendered and accepted.

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and a ticket issued, which was the only ticket a passenger from San Francisco to Alameda via Oakland could obtain,—the only ticket provided by the defendant. This being so, the defendant cannot be permitted to say that it was not the ticket which the statute obliged it to provide and issue, and this is more especially true in view of the fact that it contained nothing which in terms denied or assumed to curtail the rights conferred by the statute.

But it is said that the ticket is not the contract; that it is a mere token or voucher, and that it is the duty of the passenger to inform himself of the rules and regulations of the carrier, which really determine his rights. This is perhaps true to a certain extent. But the passenger is not bound to take notice of any rule or regulation which contravenes the law of the land. So far as the law fixes the terms of the contract, it cannot be varied by rules of the company, known or unknown, unless assented to by the passenger.

We have held that under the law of California the ticket issued by a railroad company upon receipt of the regular fare from one depot to another gives the holder the right to stop over at an intermediate station, and to resume his journey at any time within six months; and, if this is so, it matters not how well it may be known to a particular passenger that this right is contested or denied by the company. He nevertheless acquires, by payment of the regular fare, all the rights which the statute gives him. The passenger who is informed of the claim and practice of the carrier is in no worse position than one who is not informed. So far as the law goes, it protects all alike.

These views are conclusive of the question submitted for reargument, and for the reasons here stated, and those set forth in the original opinion, *the judgment and order of the superior court are affirmed.*

We concur: GAROUTTE, J.; HARRISON, J.; VAN FLEET, J.; FITZGERALD, J.; DE HAVEN, J.

McFARLAND, J.—I dissent. There was nothing in the argument on rehearing which in the least changes my mind as to these propositions: (1) That section 490 of the Civil Code does not require a railroad company to “provide” or “fur-

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nish " a stop-over ticket, under either the legal or the common meaning of that word; and (2) that the ticket which appellant did "furnish" respondent was not, on its face, a stop-over ticket, but merely gave him the right to go either to Oakland or Alameda,—not to both; and that he well knew the meaning and purpose of the ticket when he accepted it. This action is not for refusing respondent the kind of ticket he wanted, but for refusing to do something for which the ticket he accepted did not provide.

Dissenting
opinion.

In my opinion, the judgment can be affirmed only upon the theory that, if respondent had paid the proper fare, he could ride, and get off, and get on again, as often as he pleased, upon any sort of a ticket, or without any ticket at all.

ST. LOUIS & SAN FRANCISCO RAILWAY CO. v. GILL (John B.). Same v. STEVENSON. Same v. TRIMBLE. Same v. CARTER.

(156 U. S. 649.)

Tickets and Fares [(1) p. 108]—Statutory Exemption from Legislative Interference with Passenger Rates—Purchaser of Road does not Acquire such Privilege of Exemption.—A special statutory exemption or privilege, given by law to a railroad company, whereby its passenger rates within certain limits are to be unaffected by future legislation, does not, in the absence of direction to that effect in the statute, accompany the property of the corporation in its transfer to the purchaser thereof. (*Pages 69, 70.*)

Effect, on Net Earnings of Road, of the Regulation of Rates by Legislature—Test of Reasonableness of Rates.—Whether a certain mileage rate for carrying passengers, fixed by the legislature, is reasonable, must be determined by its effect upon the net earnings of the company on its entire line within the state which fixes the rate, and is not to be judged by its effect upon any subdivision of the road, even though such subdivision was once a distinct line of road. (*Pages 71, 78.*)

Same Penalties for Charge in Excess of Statutory Rate—Question of Reasonableness of Rate, How Raised.—Where a rate of so much per mile is fixed by the legislature for carriage of passengers, and where penalties are prescribed for a charge in excess of such rates, which penalty is to be recovered by the passenger excessively charged, the question of the reasonableness of the established rate may be raised in an action brought to recover such penalty. (*Page 79.*)

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IN ERROR to the supreme court of the state of Arkansas.

On the 16th day of August, 1880, under the general laws of the State of Arkansas, a company was incorporated under the name and style of the St. Louis, Arkansas & Texas Railway Company, and authorized to construct a railway from the northern boundary of the state of Arkansas to Fayetteville, in that state. This railroad was connected at its northern terminus with the railroad of the St. Louis, Arkansas & Texas Railway Company, a corporation of the state of Missouri, and at its southern terminus with the railroad of the Missouri, Arkansas & Southern Railway Company, a corporation of the state of Arkansas.

Facts.

Under provisions of the laws of the states of Arkansas and Missouri, on the 10th day of June, 1881, the three companies mentioned were consolidated into a single corporation, under the style of the St. Louis, Arkansas & Texas Railway Company, consolidated.

On and previous to the 21st day of February, 1882, it was provided by the laws of the states of Arkansas and Missouri that any railroad company incorporated under the laws of the state of Missouri might lease or purchase any part of a railroad, with all its rights, privileges, immunities, real estate, and other property, the whole or a part of which was in the state of Missouri, and constructed, owned, or leased by any other company, if the lines of the roads of said companies were connected and continuous, and that any railroad company incorporated under the laws of the state of Arkansas whose road was wholly or in part constructed and in operation was authorized to sell, lease, or otherwise dispose of the whole or any part of its railroad, with all the rights, privileges, franchises, and immunities thereunto belonging, to any connecting railroad or any railroad corporation then or thereafter organized under the laws of the state of Missouri, or of the United States, or of both.

In the manner provided by those laws, the St. Louis, Arkansas & Texas Railway Company, Consolidated, on the 21st day of February, 1882, sold and conveyed all of its railway in the states of Arkansas and Missouri, together with all its rights, privileges, franchises, and immunities, to the St. Louis & San Francisco Railway Company, a corporation organized under the general laws of the

Facts continued.

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state of Missouri and under several acts of the congress of the United States.

By an act of the legislature of Arkansas, approved April 14, 1887, the maximum rate of passenger-fares to be charged in that state was fixed at three cents per mile, and a penalty of \$300 was given the passenger for each overcharge. At the fall term of 1887 of the Washington county circuit court, John B. Gill brought an action against the St. Louis & San Francisco Railway Company, alleging that said company, operating a railroad within the state of Arkansas more than 75 miles in length, had on five distinct occasions charged and received from the plaintiff more than three cents per mile, and demanding judgment for the penalties prescribed in the said statute.

The St. Louis & San Francisco Railway Company filed several pleas or special answers to the complaint, two of which are alleged to raise federal questions. To these special pleas the plaintiff demurred, and the demurrers were sustained. The defendant then made several offers tending to show that the rate of three cents per mile for each passenger carried was unreasonable, and did not enable the defendant to pay its interest or to earn anything on its capital stock. These offers were ruled out, on plaintiff's objection, as incompetent and irrelevant. Due exceptions were taken by the defendant to the action of the court in sustaining the demurrers and in excluding plaintiff's evidence.

Judgment went for the plaintiff, which was on appeal affirmed by the supreme court of Arkansas, to whose judgment a writ of error was sued out to this court.

Geo. R. Peck, E. D. Kenna, A. T. Britton, and A. B. Browne, for plaintiff in error.

A. H. Garland and D. W. Jones, for defendants in error.

Mr. Justice SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

By the act of April 14, 1887, the legislature of Arkansas prescribed a maximum rate of three cents per mile for each passenger carried by the railroads of that state, and a penalty of \$300 for each overcharge, payable to the passenger from whom such overcharge had been exacted. Case stated.

It was found by the trial court, a jury having been waived, that John B. Gill, the plaintiff, had on several occasions,

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while traveling on the railroad of the St. Louis & San Francisco Railway Company, between points within the territory of the state of Arkansas, been charged a rate in excess of that allowed by the statute.

The defendant company set up, by way of defense, that it operated that portion of the railroad on which the plaintiff traveled as a purchaser and assignee of the St. Louis, Arkansas & Texas Railway Company, a corporation organized under the laws of the state of Arkansas; that, under the laws of Arkansas in force at the time of the incorporation of said last-mentioned company, in April, 1880, it had the right to fix and regulate the rate of charge for carrying passengers, not to exceed the sum of five cents per mile; that the legislature might, from time to time, reduce the rates, but that the same should not be so reduced as to produce, as profits for the railroad company, less than 15 per cent. per annum on the capital actually paid in; and that, until such profits did annually accrue to said company, it and its successors and assigns were entitled, without limitation, restriction, or control, to the right to fix such rates of fares as to it should seem proper, not exceeding the rate of five cents per mile; that such provisions of the law constituted a contract between the St. Louis, Arkansas & Texas Railway Company and the state, and that the St. Louis & San Francisco Railway Company, having become, in a manner and form provided by the laws of the state, the assign of the St. Louis, Arkansas & Texas Railway Company, and the owner of its road, franchise, and privileges, had succeeded to its right to charge passenger-rates not in excess of five cents per mile, so long as its profits did not exceed 15 per cent. per annum on the capital actually paid in; that the said railroad, although completed for about five years, had never earned in profits an amount equal to 3 per cent. on the capital actually paid in; that the net earnings or profits for the next ensuing two years will not exceed 3 per cent. on the capital actually paid in, or on the amount actually expended in the construction of said railroad; that the consolidation of the St. Louis, Arkansas & Texas Railway Company of Arkansas with the company of the same name, incorporated in Missouri, and the sale by the company so formed of its railroad to the defendant, each severally became and were compacts made between the states of Missouri and Arkansas with each other,

Case stated—
Continued.

with the consolidated company and with the defendant company respectively; that the act of April, 1887, of the legislature of Arkansas, attempting to fix passenger-rates at less than five cents per mile, in so far as it relates to the defendant's line of railway, never received the assent of the state of Missouri or of the defendant company; and that such enactment was an alteration and impairment of a contract. and as such null and void, under the provisions of the constitution of the United States.

To this plea or special answer, the plaintiff demurred.

As a further plea or special answer, the defendant company alleged, in connection with a history of the formation of the original companies, their consolidation, and the purchase of the consolidated railroad by the defendant, that by a provision of the constitution of the state of Arkansas, in force at the time of the transactions narrated it was provided that no charter of any corporation should be altered, annulled, or repealed in such a manner as to do injustice to the corporators; that the owners of the capital stock of the St. Louis, Arkansas & Texas Railway Company are the same and identical persons who own the capital stock of the defendant company; and that if the rates of fare prescribed by the act of April, 1887, are enforced, the defendant company will not be able to earn a reasonable rate of interest on its indebtedness, or to meet the actual cost of transporting passengers and maintaining said division of its road; and that, therefore, said act of April, 1887, as far as it is applicable to the said railroad, is in violation of the constitution of Arkansas, and is unreasonable, and a taking of private property for public use without compensation, and is therefore in violation of the fifth and fourteenth amendments to the constitution of the United States.

The plaintiff demurred likewise to this plea, and, the demurrers having been sustained, the defendant then offered to

show that the St. Louis, Arkansas & Texas Railway Company had on December 31, 1880, executed bonds to the amount of \$600,000, and secured the same by a mortgage of all its property, franchises, and immunities to the United States Trust Company of New York, which bonds were yet wholly due and unpaid, and upon which the defendant was required to annually pay the sum of \$36,000 as interest; that the defendant company

Case stated—
Continued.

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has never since the construction of said lines been able to earn, from all sources, an amount which, after paying for the actual expenditures, would yield to the defendant or to the original incorporators a profit equal to 1 per cent. upon the capital stock actually paid in cash, and used in the construction of such lines of railroads; that the actual cost of transporting each passenger over that portion of the defendant's railway in the plaintiff's petition mentioned exceeded the sum of 3 cents per mile; that, at the times in plaintiff's petition mentioned, the defendant could not actually perform the service of carrying the plaintiff or any other passenger over its railway for the sum of 3 cents per mile, but that the sum in cash which it was actually required to expend in the carriage of said plaintiff and other passengers was equal to 33-10 cents for each and every mile such passenger was carried, and that, if defendant was required to perform the service at the rate of 3 cents per mile, it would be required to expend more money in cash for the performance of such service than it would receive from the passenger, and that the revenue or income which it would receive from all sources of profit other than the passenger traffic would not be sufficient to enable it to make good the amount which it would lose on its passenger business; that 3 cents per mile for the service rendered by the defendant in carrying passengers, at the times in plaintiff's petition mentioned, over the line of railroad therein described, was not reasonable compensation, and that no less than 5 cents per mile would be a reasonable sum, or one that would be just to the defendant; that defendant never had, since the construction or completion of said lines of railway, been able to earn from all its sources of revenue an amount which, after paying for the actual cash expenditure necessary for the operation of its road, would yield a profit equal to 1 per cent. upon the actual cash cost of said road, which amounted to over \$40,000 for every mile of railway constructed.

To this evidence the plaintiff objected as incompetent and irrelevant. The objection was sustained, and the defendant excepted to the action of the court in sustaining the demurrers and in rejecting the said offers of evidence.

There was judgment for the plaintiff, from which the defendant appealed to the supreme court of Arkansas, from whose judgment, affirming that of the court below, a writ of error was allowed to this court.

The plaintiff in error bases its demand that the judgment of the supreme court of Arkansas should be reversed on two propositions:

First, that the act of April, 1887, as applied to the defendant's railroad, was a violation of a contract between the state of Arkansas and the various corporations which constructed or subsequently acquired the line of railway in question; and,

Second, that as the act, as applied to the defendant's railroad, requires the defendant to do business at a positive loss, it therefore constitutes a taking of defendant's property without just compensation or due process of law.

The first proposition requires the plaintiff in error to show that there existed a contract between the state of Arkansas and the St. Louis, Arkansas & Texas Railway Company which, under the existing facts, forbade the application of the act of 1887 to the business of that company, and that the plaintiff in error, the St. Louis & San Francisco Railway Company, succeeded to such contract right.

Special privileges - Transfer of line does not convey.

As already stated, the constitution of Arkansas contained, when the St. Louis, Arkansas & Texas Railway Company was organized, a provision that the general assembly should have the power to alter, revoke, or annul any charter of incorporation then existing, or that might thereafter be created, whenever, in their opinion, it may be injurious to the citizens of the state, in such manner, however, that no injustice shall be done to the corporators.

The law under which the St. Louis, Arkansas & Texas Railway Company was organized provided that the legislature might, when any such railroad shall be opened for use, from time to time, alter or reduce the rates of toll, fare, freights, or other profits upon such road; but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than 15 per cent. per annum on the capital actually paid in; nor unless, on an examination of the amounts received and expended, to be made by the secretary of state, he shall ascertain that the net income derived by the company, from all sources, for the year then last past, shall have exceeded an annual income of 15 per cent. upon the the capital of the corporation actually paid in.

The contention is that, if the facts show that the company has not earned 15 per cent. per annum on the capital actually

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paid in, the state is precluded, notwithstanding the power reserved in the constitution, from reducing the rates or charges.

The supreme court of the state (54 Ark. 101, 47 Am. & Eng. R. Cas. 462), as we learn from the record in this case, was of the opinion that the power to alter and amend charters, reserved to the state in its constitution, was not parted with or controlled by the subsequent act of the legislature incorporating the railroad company, and authorizing it to establish rates, and that accordingly the passage of a subsequent general law prescribing rates could not be deemed an infringement of a contract between the state and the company.

We do not find it necessary to express an opinion on this view of the case, but prefer to base our judgment on another ground, which will bring us to the same result. It has been frequently decided by this court that a special statutory exemption or privilege, such as immunity from taxation or a right to fix and determine rates of fare, does not accompany the property in its transfer to a purchaser, in the absence of express direction to that effect in the statute. *Morgan v. Louisiana*, 93 U. S. 217; *Wilson v. Gaines*, 103 U. S. 417; *Railway Co. v. Miller*, 114 U. S. 176, 6 Am. & Eng. R. Cas. 627.

We find here no such express statutory direction, nor is there any equivalent implication by necessary construction. As is said in the decision of the supreme court of Arkansas in the present case: "The corporations owning the several parts of the road as to which it is charged that the act operates unjustly were dissolved years before it was passed. As to them it could not operate unjustly, and in their behalf no cause of complaint can exist."

These considerations dispose of the proposition that the act of April, 1887, if made to apply to the railroad of the plaintiff in error, would operate as a violation of a contract subsisting between the state of Arkansas and the St. Louis & San Francisco Railway Company.

We are thus brought to the second proposition relied on by the plaintiff in error,—that as the act, when applied to the defendant's railroad, requires the company to do business at a positive loss, it therefore constitutes a taking of defendant's property without due process of law.

Whether, if the power of the state to fix and regulate the

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passenger and freight charges of railroad corporations has not been restricted by contract, there can be found, by judicial inquiry, a limit to such power in the practical effect its exercise may have on the earnings of the corporations, presents a question not free from difficulty. Given the case of a general law prescribing rates to all companies, can the courts inquire whether such rates are reasonable, and may they find that as to one company the prescribed rates permit it to do business at a profit, and as to another, whose facilities are inferior, or where expenditures are greater, the rates afford no profit? And will the fate of the law, as to its validity, depend in each case on the result of such an inquiry?

Power of state
to regulate
charges.

This court has declared in several cases that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws. Railroad Commission Cases, 116 U. S. 331; Dow v. Beidelman, 125 U. S. 681, 34 Am. & Eng. R. Cas. 322; Railway Co. v. Minnesota, 134 U. S. 418; Railway Co. v. Wellman, 143 U. S. 339, 49 Am. & Eng. R. Cas. 1; Reagan v. Trust Co., 154 U. S. 362.

Legislation
destructive of
value—Rem-
edy in courts.

The so-called "Railroad Commission Cases" (116 U. S. 307), arose under an act of the state of Mississippi passed March 11, 1884, which created a railroad commission, and charged it with the duty of supervising railroads, and particularly with the duty of revising the tariff of charges. The Mobile & Ohio

Same—Pre-
cedents exam-
ined.

Railroad Company had been theretofore incorporated by a charter which granted to it "the right from time to time to fix, regulate, and receive the tolls and charges by them to be received for transportation." A bill was filed by the Farmers' Loan & Trust Company, a New York corporation, to enjoin the railroad commission from enforcing against the Mobile & Ohio Railroad Company the provisions of the railroad commission act, and averring that the complainants were the trustees

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in a mortgage that had been executed prior to said act, and that the enforcement of the latter would impair their security.

The court held, two justices dissenting, that the statute incorporating the company did not deprive the state of its power, within the limits of its general authority, to act upon the reasonableness of the tolls and charges so fixed and regulated, and reversed the decree of the circuit court which had granted an injunction as prayed for in the bill. We now refer to this case for the purpose of calling attention to the facts that the act provided that proceedings to enforce its provisions were to be instituted by the commission, and that the suit was in the form of a bill in equity to restrain the commission from applying the terms of the act to the Mobile & Ohio Railroad Company.

The case of *Railway Co. v. Minnesota* was a writ of error to review a judgment of the supreme court of Minnesota, awarding a writ of mandamus against the railway company. The state of Minnesota, by an act approved March 7, 1887, had established a railroad and warehouse commission, providing that the rates of charge for the transportation of property published by the commission should be final and conclusive as to what are equal and reasonable charges, and that there should be no judicial inquiry as to the reasonableness of such rates; and the railroad company contended that the rates prescribed by the commission were unreasonable, and that as the company was not permitted to put in testimony as to the reasonableness of such rates, the act was in conflict with the constitution of the United States, as depriving the company of its property without due process of law, and by depriving it of the equal protection of the laws.

As heretofore stated the company's position was sustained, and the decree of the Minnesota court awarding the writ of mandamus was reversed.

But it will be observed that the state was represented by the commission and that the remedy went to the validity of the legislation as affecting the railroad company's business as a whole. It was not a suit between the company and an individual customer.

Mr. Justice MILLER, in his concurring opinion, said: "Until the judiciary has been appealed to, to declare the regulation made, whether by the legislature or by the commission, voidable for unreasonableness, the tariff of rates so fixed is the

Same—Cases
examined con-
tinued.

law of the land, and must be submitted to both by the carrier and the parties with whom he deals; that the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission is by a bill in chancery asserting its unreasonable character and its conflict with the constitution of the United States, and asking a decree of the court forbidding the corporation from exacting such fare as excessive, or establishing its rights to collect the rates as being within the limits of just compensation for the service rendered; that until this is done it is not competent for each individual having dealings, with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method; and that in the present case, where an application is made to the supreme court of the state to compel the railroad companies to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceedings the reasonableness of the charges fixed by the commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the commission before granting such relief that it would have if called upon so to do by a bill in chancery."

Railway Co. v. Wellman, 143 U. S. 339, 49 Am. & Eng. R. Cas. 1, was a contest over the validity of an act of the legislature of Michigan, passed in June, 1889, fixing the amount per mile to be charged by railways for the transportation of passengers. On the very day the law took effect, to wit, October 2, 1889, one Wellman went to the railroad company's office in Port Huron, and tendered for a ticket from that place to Battle Creek the sum of \$3.20, instead of \$4.80, which had been the regular fare. This was refused, and Wellman immediately brought an action for damages, and recovered a judgment for \$101, an amount sufficient to take the case to a higher court; and ultimately the supreme court of Michigan affirmed the judgment sustaining the validity of the law. Wellman v. Chicago, etc., R. Co., 83 Mich. 592.

But the observations of this court by Mr. Justice Brewer are very pertinent to the present case. After stating the facts of the case, he said: "Can it be, under these circumstances, that the court erred in peremptorily refusing to instruct

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the jury that an act fixing a maximum rate at two cents per mile is unconstitutional? Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinion as a finality? Must it be declared, as a matter of law, that a reduction of rates necessarily diminishes income? May it not be possible, indeed does not all experience suggest the probability, that a reduction of rates will increase the amount of business, and therefore the earnings?"

Same—Cases
examined con-
tinued.

And, referring to the following observation made by the supreme court of Michigan in passing upon the case: "In the stipulation of facts or in taking of testimony in the court below, neither the attorney-general nor any other person interested for or employed in behalf of the people of the state took any part. What difference there might have been in the record had the people been represented in the court below, however, in our view of the case, is not of material inquiry,"—Mr. Justice Brewer added: "We think there is much in the suggestion. The theory upon which apparently this suit was brought, is that parties have an appeal from the legislature to the courts, and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature so to enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between parties. It was never thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act. * * * One suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

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Similar observations may be found in *Dow v. Beidelman*, 125 U. S. 690, 34 Am. & Eng. R. Cas. 322, a case wherein the validity of the very act now in question was assailed, and where this court affirmed the judgment of the supreme court of Arkansas sustaining the act. *Dow v. Beidelman*, 49 Ark. 325.

Same—Cases
examined con-
tinued.

In that case the action had been brought by a passenger claiming penalties because he was charged more than the statutory rates, and the case went off on an agreed statement of facts, and it was said in this court, by Mr. Justice GRAY: "The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to three cents a mile. They argue that it is in this case by reason of the admitted facts, that with the same traffic that their road now has, and charging for transportation at the rate of three cents per mile, the net yearly income will pay less than one and a half per cent, on the original cost of the road, and only a little more than two per cent. on the amount of its bonded debt. But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the company as reorganized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equaled the original cost of the road or the amount of outstanding bonded debt. Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature was unreasonable. Still less does it appear that there has been any such confiscation as amounts to a taking of the property without due process of law."

Reagan v. Trust Co., 154 U. S. 362, is the last case to which we deem it necessary to refer. The principal facts of the case were these: In April, 1891, the legislature of Texas passed an act establishing a railroad commission with power to classify and regulate rates. After the commission was organized, it proceeded to establish certain rates for the transportation of goods over the railroads in the state. Thereafter, in April, 1892, the Farmers' Loan & Trust Company of New York filed a bill in the circuit court of the United States for the Western district of Texas, making as defendants the rail-

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road commissioners, the attorney-general, and the International & Great Northern Railroad Company.

The bill alleged that the complainant was the trustee in a mortgage on said railroad to secure a series of bonds, and averred generally that the rates fixed by the commission were unreasonable and unjust, and set forth certain specific facts which it claimed established the injustice and unreasonableness of those rates, and prayed a decree restraining the commission from enforcing those rates or any other rates, and also restraining the attorney-general from instituting any suits to recover penalties for failing to conform to such rates. The International & Great Northern Railroad Company appeared, filed an answer, and also a cross-bill similar in its scope and effect to the bill filed by the plaintiff, and praying substantially the same relief.

The commission and the attorney at first filed answers, which they subsequently withdrew, and filed demurrers; leave being given at the same time to the complainant and cross-complainant to amend the bill and cross-bill before the filing of the demurrer. The amendments contained allegations in considerable detail of the losses in revenue sustained by the company through the enforcement of the statutory rates, and the average reduction caused thereby in the rate theretofore existing.

Same—Cases
examined con-
tinued.

The circuit court entered a decree granting the injunctions as prayed for, restraining and forbidding the commission from enforcing the established rates, and from making or publishing any other or further rates.

The opinion of this court on appeal was that while it was within the power of a court of equity in such case to decree that the rates so established by the commission were unreasonable and unjust, and to restrain their enforcement, it was not within its power to establish rates itself, or to restrain the commission from again establishing rates.

After recognizing the previous cases as establishing the proposition that, while it is not the province of courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of freights, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of

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other property, the court proceeded to consider and discuss the question whether the rates prescribed by the commission were unjust and unreasonable.

Upon reading the opinion, it is obvious that the principal difficulty encountered was whether the facts alleged in the bill and cross-bill, conceded by the demurrers to be true, furnished the court sufficient evidence to enable it to find, as a judicial conclusion, that the statutory rates were unreasonable; and Mr. Justice BREWER, who delivered the opinion of the court, after reciting a broad allegation in the bill, said: "It may not be just to take this as an allegation of a mere matter of fact, the truthfulness of which is admitted by the demurrer, and which, as thus admitted, eliminates from consideration all questions as to the true character and effect of the rates; yet it is not to be ignored. There are often in pleadings general allegations of mixed law and fact, such as the ownership of property and the like, which standing alone, are held to be sufficient to sustain judgments and decrees, and yet are always regarded as qualified, limited, or even controlled by particular facts stated therein. It would not, of course, be tolerable for a court of equity to seize upon a technicality for the purpose or with the result of entrapping either of the parties before it.

Hence we should hesitate to take the filing of the demurrers to these bills as a direct and explicit admission on the part of the defendants that the rates established by the commission are unjust and unreasonable. It must be noticed that at first answers were filed, tendering issue upon the matters of fact, and testimony was taken, the extent of which, however, is not disclosed by the record. After that the defendants applied for leave to withdraw their answers and file demurrers. It is not to be supposed that this was done thoughtlessly. But one conclusion can be drawn from that action, and that is that, upon the taking of the testimony, defendants became satisfied that the particular facts were as stated in the bills, and that the conclusions to be drawn from such facts could not be overthrown by any other matters. Hence, if it appears that the facts stated in detail tend to prove that the rates are unreasonable and unjust, we must assume, as against the demurrers, that the general allegation heretofore quoted is true, and that

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tinued.

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there are no other and different facts which, if proved, might induce a different conclusion, and compel a different result."

As already stated, the defendant's railway was composed by consolidation of one incorporated in Missouri and of two incorporated in the state of Arkansas. The allegations contained in the fourth answer of the railroad company have reference to that part of the defendant's railroad that originally belonged to the St. Louis, Arkansas & Texas Railway Company, incorporated under the laws of the state of Arkansas. Those allegations were to the effect that such portion of the railroad was traversed by the plaintiff below, and was highly expensive to construct and maintain, and that the cost of transporting passengers over said division and the maintenance thereof exceed the maximum fixed by the act of 1887. The offers of evidence we also understand, notwithstanding their general terms, to have been intended to sustain the allegations contained in the fourth answer, and not to be applicable to the company's entire railroad. Thus, one of the offers was to show that "the actual cost of carrying each passenger over that portion of defendant's railway in plaintiff's petition mentioned, and over all its railway therein referred to, did and does now exceed the sum of three cents per mile for each and every passenger so carried," and another was to show that "three cents per mile for the service rendered by defendant in carrying passengers, at the times in plaintiff's petition mentioned, over the line of railroad therein mentioned, was not reasonable compensation, and that no less than five cents per mile would be a reasonable sum."

It therefore appears that the allegations made and the evidence offered did not cover the company's railroad as an entirety even in the state of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas & Texas Railway, and extending from the northern boundary of Arkansas to Fayetteville, in said state.

In this state of facts we agree with the views of the supreme court of Arkansas, as disclosed in the opinion contained in the record, and which were to the effect that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn

**Certain facts
restated.**

**Net profits a
test of reason-
ableness of
rates.**

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a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated; and, finally, that, to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state of Arkansas.

Sometimes, in acting on this subject, the state legislatures have created commissions or boards of public works, with power to establish rates for the transportation of passengers and freight; and in such instances the course recommended by Mr. Justice MILLER, already cited, may well be followed,—that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding wherein the rights of the public as well as those of the company complaining can be protected.

But there are other cases, and the present is one, where the legislatures choose to act directly on the subject by themselves establishing a tariff of rates, and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission which can be made to respond, and therefore, if the companies are to have any relief, it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties.

However, we have seen that in the present case the evidence failed, in that it was restricted to a part only of the railroad, and that, even if the evidence could be understood as applicable to the entire line in Arkansas, there was no finding of the facts necessary to justify the courts in overthrowing the statutory rates as unreasonable, but that, on the contrary, the company's case depended on allegations admitted by the demurrer of a party who, in no adequate sense, represented the public; and, upon the whole, we do not feel warranted, by all that appears in this record, in declaring invalid an act of the legislature of Arkansas which on its face

Legislative
regulation of
fares—Reason-
ableness of
rates how
tested.

Conditions on Ticket Ellsworth v. Chicago, B. & Q. R. Co.

appears to be a legitimate exercise of power, and which has not been shown by clear and satisfactory evidence to operate unjustly and unreasonably, in a constitutional sense, against the plaintiff in error.

The judgment of the supreme court of Arkansas is accordingly *affirmed*.

The cases of THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, Plaintiff in Error, v. JOHN STEVENSON (No. 174, October term, 1894), the SAME v. M. H. TRIMBLE (No. 175, October term, 1894), and the SAME v. A. H. CARTER (No. 176, October term, 1894), are similar in their facts to the case of The St. Louis & San Francisco Railway Company v. John B. Gill (No. 173, October term, 1894), just decided, and are to be similarly disposed of. An additional fact—that a portion of the road traveled over consisted of a bridge, built under authority of an act of congress—is made to appear; but as no point is made or argued in the brief of the plaintiff in error, and as we see in such fact nothing that would affect the result, the judgments of the supreme court of Arkansas in those cases are *affirmed*.

ELLSWORTH

v.

CHICAGO, BURLINGTON & QUINCY R. CO.

(*Supreme Court of wa, May 28, 1895.*)

Tickets and Fares [(1) p. 108]—**Non-payment for Ticket when Received—Effect upon Passenger's Rights.**—The fact that a person procured a ticket upon his promise to the agent to pay therefor on his return from his journey, there not being time to pay for the same before the starting of the train, does not invalidate the ticket, nor change his rights thereunder as a passenger, where he makes payment therefor as promised (*Page 82.*)

Same—Conditions on Ticket [(2) p. 110]—**“Continuous Passage Within one day of Date of Sale”**—**Conflict Between date on Ticket and Actual Date of Sale—Right of Carriage Thereon.**—Under the clause, “continuous passage within one day of date of sale,” upon a ticket, the purchaser thereof is entitled to passage on the date of the actual purchase of that ticket, notwithstanding that there is an error upon the ticket as to such actual date (*Page 83.*)

Same—Same—Ejectment of Passenger [(1) p. 156]—**Damages.**—Where a ticket containing the above mentioned clause is presented for passage on the actual day of purchase, but the conductor refuses to accept the

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same because it bears a prior date which, if the true date of the sale, would not have entitled the holder of the ticket to passage, the latter may refuse to pay additional fare or to get off the train, and if forcibly ejected may recover damages therefor. (*Page 86.*)

Same—Same—Same.—In such an action the right of recovery in the passenger, for such ejection, is not impaired by the fact that although he claimed his right to travel upon his ticket he offered to pay the regular fare, refusing simply to pay the extra charge demanded for cash fare paid on the train. (*Page 88.*)

APPEAL from Adams county district court.

On the morning of September 27, 1893, the plaintiff procured a ticket on defendant's line of road from Prescott to Corning, a distance of $7\frac{1}{8}$ miles. Because of the fair at Corning, the company was selling round-trip tickets at reduced rates, which tickets had to be filled in with a pen. The plaintiff was late reaching the depot at Prescott, so that there was no time to fill up a round-trip ticket, and he told the agent to give him a "straight ticket." The train was moving, and plaintiff took the ticket handed him, and caught the train, and got onto the rear platform. Because of his haste, he did not pay for the ticket, but said to the agent that he would pay on his return, to which the agent assented.

Facts.

By a rule of the company, tickets must be used on the day they are purchased, and, if not so used, they may be returned, and the purchase money will be refunded. The ticket given plaintiff was dated September 24, 1893, instead of the 27th, the day on which it was handed to plaintiff. The delivery of the ticket to plaintiff was a mistake, it having before been sold, and not used, and then redeemed, as above stated. The redemption was by the night agent at Prescott, who put it in the drawer in the ticket office, and the day agent, without noticing the date, gave it to plaintiff. When a short distance from Prescott, the conductor asked for plaintiff's ticket, and the ticket in question was handed him, which, because of its date, he refused, and demanded the fare. The regular fare to Corning is 22 cents, and by the rules of the company, authorized by the laws of the state, 10 cents above the regular fare is collected by conductors when the ticket office has been opened for a reasonable time before the departure of trains, and tickets are not secured. After the refusal of the conductor to receive the ticket, plaintiff offered to pay the regular fare, but refused to pay the additional 10

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cents. The train was stopped, and plaintiff ejected, and this action is for damages.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Affirmed.

Smith McPherson, for appellant.

Davis & Wells, for appellee.

GRANGER, J.—1. The court gave the jury the following instruction: "The ticket introduced in evidence, and which is admitted as the one purchased by plaintiff of defendant's agent, is dated September 24, 1893, and contains the following clause: 'Continuous passage within one day of date of sale. You are instructed that said clause is a limitation of the time on which said ticket will be honored, and, as such, is a reasonable limitation and rule. You are further instructed that, presumptively, the date of the ticket was the day of its sale. But if, as a matter of fact, the day of the sale differs from the date of the ticket, yet the said ticket by its express terms was good from the date of sale, and you find from the evidence that said ticket was purchased by plaintiff on the 26th or 27th day of September, 1893, and was presented within one day from the actual date of such sale, it was good for such passage between the points named, to wit, Prescott and Corning.'"

The instruction is said to involve error because it treats the transaction between the agent and plaintiff as a sale of the ticket, when it appears that the ticket was not paid for on delivery, but was paid for afterwards on the same day. On that branch of the case the court gave the following instruction: "In the case at bar it is admitted that plaintiff procured a ticket from the defendant's agent at Prescott before entering defendant's cars. It is also admitted that payment was not made until thereafter. On this branch of the case you are instructed that a neglect of plaintiff to pay for the same at that time, under the circumstances shown on the trial of this case, would not alone, or for that reason, invalidate the ticket; and an acceptance on the part of the agent of plaintiff's promise to pay therefor on his return, and a payment thereafter, constitute a valid consideration and payment therefor."

It seems to us that that is the correct rule. Had there

"Continuous
passage" on
day of sale—
Instruction.

Nonpayment
for ticket
when received
—Instruction.

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been a refusal to accept the ticket because not paid for, the question might be different. It is not what could be called a credit sale, nor was it intended as such, but only a delay in payment because there was not time to pay and get the train, and payment was expected the same day, and so made.

2. There is a further complaint of instruction No. 6 because, notwithstanding the clause, "continuous passage within one day of date of sale," it holds the ticket good if presented "within one day from the actual date of such sail."

This contention means that the validity of the ticket for the passage depended upon its date rather than the fact as to the sale. We cannot concur in that view. It is not to be believed that the company ever intended to sell a ticket that should not be honored for a passage on the day of the actual sale. It is true that the intent is, in such cases, to have the two dates concur, but no company or person would ever design that its mistake in such a way should be to the prejudice of a purchaser of a ticket. It is not to be doubted that both the company and the plaintiff intended that the ticket in question should be good for a passage on the train on which it was offered. The facts admit of no other conclusion. It is equally true that the plaintiff was, as between himself and the company, entitled to passage on that train, and that his ejectment from it was wrongful.

The more difficult question is as to his remedy for the wrong done him; that is, when the conductor refused to accept the ticket because of its date, had the plaintiff the legal right to insist on a passage on that train, and resist removal therefrom, or should he have paid his fare, as demanded, and sought redress from the company on that basis, or, not wishing to do that, should he, on request of the conductor, to avoid damage, have left the train without resistance, and based his damage on the mistake in selling him the ticket?

Authorities on this question are far from being harmonious. Other courts have, and this court should, in determining these questions, keep in mind the difficulties to be met with and overcome in a successful management of the railway-passenger traffic of the country, both as to the public and the carriers. To such an end it is clearly important that there shall be rules for the guidance of employes in the different parts of the

"Continuous
passage" on
date of sale—
Conflict of
dates.

Same—Ejec-
tion of passen-
ger—Remo-
dies.

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service, and that such rules should be conclusive as to their course of conduct, even though at times the rule may operate to the prejudice of an individual passenger.

We may instance a case or two as illustrative of it, as when a person who has purchased a ticket loses it. All will at once see that, although he has paid for the passage, he is not entitled to it on the lost ticket, because the only evidence to show the conductor that he has purchased a ticket is his word, and the confusion and consequences to result from such a system of management are too manifest to deserve comment.

Take, also, a case in which a ticket is paid for, but no ticket handed to the passenger, through the neglect of the agent, and the passenger boards the train with no evidence of a right to a passage. The equitable status of the passenger in this case is somewhat stronger than in the other, but the importance of a rule of conduct for the conductor is equally strong. In such a case there is no harshness in the rule requiring him to seek his damage, if any, on the basis of a failure to deliver the ticket, and which excludes him from any rights on the train because of his payment for the ticket.

It is safe to state, as a rule of passenger traffic, that no person has a right to passage on a train without paying fare, unless a ticket or other evidence of a right to transportation is presented to the conductor. This holding, at the outset, puts us to that extent in line with the authorities on the subject, a number of which are cited by appellant in support of its contention in this case.

A case relied on by appellant is *Frederick v. Railroad Co.*, 37 Mich. 342. We have examined the case with care. In that case it was claimed by plaintiff that he called and paid for a ticket from Ishpeming to Marquette, and, by mistake, the conductor gave him one to Morgan, an intermediate station. He rode to Morgan on the ticket, and, refusing to pay his fare to Marquette, he was ejected from the train, because of which he brought the action. In that case it will be seen that the passenger had no ticket from Morgan to Marquette, a fact known to him before reaching Morgan.

The case in this respect is quite in line with the rule we announce, and, in this respect, unlike the case at bar. The opinion in that case deals somewhat elaborately with the importance of rules to guide conductors, and of the conclusiveness of the ticket as to his duty. In the opinion in that case

Ticket indispensable to right of carriage.

Same—Cases examined.

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it is said: "As between the conductor and passenger, the ticket must be the conclusive evidence of the extent of the passenger's right to travel. No other rule can protect the conductor in the performance of his duties, or enable him to determine what he may or may not lawfully do in managing the train or collecting fares."

With the proposition we do not differ, for, as between the conductor and passenger, no other rule can well obtain, but that is not to say that a passenger may not have rights on a train that a conductor, observing his instructions, may not violate so that the company will be liable. The reasoning in that case would carry the effect of the rule further than we indicate our approval. It treats of the duties of passengers, even when entitled to a passage on a ticket, and the right is denied by a conductor, and when a wrong ticket is issued by mistake of the agent, so that he has not the ticket he should have, and it favors a yielding on the part of the passenger to the claims of the conductor in either case, and his seeking a remedy otherwise than for an ejection from the train. The force of that case as an authority in the respects stated is much lessened, if not entirely lost, from the fact that, of the four judges, two of them place their concurrence in an affirmation on a different ground, and it does not appear that the reasoning referred to is approved by them.

In a later Michigan case, that of *Hufford v. Railway Co.*, 53 Mich. 118, 18 Am. & Eng. R. Cas. 336, the language of the *Frederick Case*, that we approve, is in substance stated and approved. In the latter case the ticket purchased was a part of an excursion ticket that had, in part at least, been canceled, and this was apparent on the face of the ticket. The agent, when shown the ticket by the purchaser, said it was good, but it really was not. In that case, to prevent ejection from the train, the passenger paid the fare, and the action was for damages because the conductor laid his hand on him to put him off, and took hold of the bell-rope to stop the train for that purpose.

It is not necessary for us to say whether or not we concur in the holding in that case, for we understand that court to rest its holding on the apparent invalidity of the ticket on its face, it having been canceled. It is said in that opinion: "But we are all of the opinion that, if the plaintiff's ticket was apparently good, he had a right to refuse to leave the car."

Same—Illustrative cases continued.

**Tickets—Apparent
Validity**

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That is what we regard as the situation in this case. Plaintiff's ticket was apparently good on its face. It should have entitled him to one first-class passage from Prescott to Corning. The fact rendering it not good was a rule of the

**Tickets—Right
of passengers
to rely upon
apparent
validity.**

company as to the time in which it could be used. These rules are changeable at the pleasure of the company, and when a ticket is purchased from one station to another, and on its face it indicates a right to that passage, no rule or regulation of the company should be permitted to defeat that right. A passenger has a right to assume that an agent placed at a station will observe the rules with reference to such matters as dates in or on a ticket. What may be the rule to-day may not be to-morrow.

Conceding plaintiff to have known of the rule previously, he was not called upon to question the act of the agent as to the rule on the day he bought the ticket. It is neither reasonable nor practicable for passengers to take notice of such matters, or attempt to correct agents in regard to them. With a ticket that expressed his right to a passage to Corning, he was not required to look behind it for the authority of the agent to issue it. We do not understand that the supreme court of Michigan would apply the rule as to yielding to the directions of a conductor to a case like this, where the ticket is apparently good, but, even if otherwise, we cannot so hold. It would be doing too much in favor of a party in the wrong merely to subserve a public convenience, for which much is claimed.

A thought in argument is, and some language of the opinions referred to seems to favor it, that it is the duty of the

**Passengers
not bound to
accept ejection
passively.**

passenger to not enhance damages by resistance, because it is of no use, but that he should submit quietly to ejection, and then seek his damages. To say the least, we think he may make any resistance not amounting to a criminal disturbance of the peace, as was done in this case, and that he is not called upon to submit to a wrongful ejection for the purpose of economizing the damages to be recovered.

Townsend v. Railway Co., 56 N. Y. 295, is another case cited and relied upon by appellant. In that case the passenger had surrendered his ticket to a conductor on another train. He changed trains, as was necessary to reach his

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Canceled Ticket

destination, but he had no evidence whatever of a right to a passage on that train. He claimed to the conductor that he had purchased a through ticket, and that the other conductor had taken it, and not given it back. For a refusal to pay he was ejected, and a recovery had in the lower court. The case was reversed on two grounds, the latter ground being the part of the opinion relied on by appellant. The rule of the case is that the remedy was an action for the wrongful act of the first conductor in taking his ticket; that the act of the first conductor did not justify the violation of the lawful regulations of another train; that he should have left the train without resistance, and if he invited force, by resistance, the company was not liable for it. The rule is not against our conclusions. The conductor was right in refusing the passage without a ticket. In such a case the passenger must pay or leave the train. If he does not he is in the wrong. But even in that case two of the judges based their concurrence on the first ground, and one on the last.

The case of *Hufford v. Railway Co.*, cited above, was appealed a second time, and is reported in 64 Mich. 631, 31 N. W. 544. It will be remembered that it is the case where the canceled ticket was sold and refused by the conductor. As bearing upon the effect of such a ticket when presented, this language is used: "The ticket given by the agent to the plaintiff was the evidence agreed upon by the parties, by which the defendant should thereafter recognize the rights of the plaintiff in his contract; and neither the company, nor any of its agents, could thereafter be permitted to say that the ticket was not such evidence, and conclusive upon the subject. Passengers are not interested in the internal affairs of the companies whose coaches they ride in, nor are they required to know the rules and regulations made by the directors of a company for the control of the actions of its agents and the management of its affairs." The case holds that even the canceled ticket, because issued for a passage, was good and conclusive.

Canceled
ticket—Sale
of to passenger
—Effect.

In *Railway Co. v. Dougherty*, 86 Ga. 744, which was an action by a colored woman for being ejected from a train, where there was a mistake, her ticket being to Asheville, N. C., instead of Atlanta, Ga., as she supposed, in the opinion it is said: "We think she had a right to rely on the

Refusal to pay
Extra Fare

Ellsworth v. Chicago, B. & Q. R. Co.

ticket she had purchased from the agent of the railroad company as being a proper one, without an examination of the same; and, nothing else appearing, there being no intervening circumstances which required her to look at the ticket, if she could have read the same, such conduct upon the part of the railroad company and its agents authorized her to recover damages. See *Railroad Co. v. Olds*, 77 Ga. 673; *Railroad Co. v. Winters's Adm'r*, 143 U. S. 60, 52 Am. & Eng. R. Cas. 328; *Railway Co. v. Fix*, 88 Ind. 381; *Railway Co. v. Holdridge*, 118 Ind. 281, 11 Am. & Eng. R. Cas. 109; *Railroad Co. v. Rice*, 64 Md. 63, 26 Am. & Eng. R. Cas. 264; *Murdock v. Railroad Co.*, 137 Mass. 293, 21 Am. & Eng. R. Cas. 268; *Burnham v. Railway Co.*, 63 Me. 298.

Some importance is attached to the fact that the plaintiff acquiesced in the demand of the conductor by offering to pay the regular fare, and only objected to the extra 10 cents, but we do not see how that makes a difference as to his right of recovery. It is not to be questioned but that he claimed his right to a passage on the ticket, and made the offer to avoid ejectment from the train. As he had a ticket, he felt that he should not be called upon to pay a penalty for a neglect of which he was not guilty. We cannot see how an offer to pay that was not accepted could excuse his ejectment from a train on which he was entitled to be.

The court authorized the jury to find exemplary damages, if it found that the act of defendant was malicious. Complaint is made of the instruction under the evidence, but it was warranted. There was evidence of the previous bad feeling and threats which, with what was done at the time of the ejectment, made the question one for the jury.

The judgment is affirmed.

Offering regular fare—Refusing to pay extra charge.

MISSOURI PACIFIC RAILWAY CO.

v.

SMITH (Dudley).

(*Supreme Court of Arkansas, Feb. 9, 1895.*)

Tickets and Fares [(1) p. 108] — **Overcharge—Voluntary Payment of as Affecting Recovery of Statutory Penalty.**—The voluntary payment by a passenger of an overcharge for the purpose of recovering the statutory penalty therefor from the railroad company does not preclude his right of such recovery. (*Page 90.*)

Same—Same—Recovery how Affected by Champertous Agreement.—A railroad company sued for the statutory penalty for making an overcharge cannot defend by showing that the plaintiff and his attorney made a champertous agreement to induce the company to accept the overcharge, and thereupon to recover the statutory penalty. (*Page 91.*)

Same—Same—Same—Sufficiency of Answer in Action to Recover—Penalty for Overcharge.—In such action an answer which alleges that the overcharge was made through a mistake as to the distance between the stations on the defendants' road, from and to which the plaintiff travelled, is insufficient upon demurrer. (*Page 92.*)

Same—Same—Same—Answer Alleging Insufficiency of Statutory Rates—Sufficiency of Answer.—In an action against a railroad company brought to recover the statutory penalty for violating the law limiting the passenger rate to three cents per mile, an answer which attacks the constitutionality of the act, in that, under the rates therein prescribed, the defendant cannot maintain and operate its railroad except at a heavy loss, and that the act is entailing a great loss upon the defendant which will eventually totally confiscate and destroy its property, rights, and franchises, in that the traffic over its road, both of passengers and of freight, is so small and unremunerative that it cannot, and has not been able to operate the road under the act without actual loss, is insufficient on demurrer, it not appearing that the statutory rate is itself unreasonable. BUNN, C. J., WOOD, J., dissenting. (*Pages 94 et seq.*)

Same—Same—Same—Disqualification of Juror.—In an action brought by a passenger against a railroad company to recover the statutory penalty for making an overcharge for carriage between certain stations, the main issue was the distance between those stations. Several jurors stated that they had sat as jurors in several causes tried at that term of court, wherein the defendants had been sued for damages for like overcharges between the same stations, and that they had opinions as to the merits of those cases, and had rendered verdicts upon the facts thereon, and it appeared that four of the jury were plaintiffs in actions against the defendant in which the same issues were involved. *Held*, that, under Sand. & H. Dig., sec. 4257, which provided that no person who has formed or expressed an opinion concerning the matter in contro-

Overcharge of Fare**Missouri Pac. Ry. Co. v. Smith**

versy which might influence his judgment, shall be a juror, such jurors are disqualified. (*Page 97.*)

Same — Same — Same — Evidence — Sufficiency of in Case Stated to Overrule Objections to Juror.—On an issue whether the defendant railroad company had charged the plaintiff more than the statutory rate of three cents per mile, the only evidence as to the distance between the stations from and to which the plaintiff had traveled, was given by a witness who testified that he was not a surveyor, but that he had measured the railway between the stations with a surveyor's chain; that he did not know the length of the chain, but that he measured the same and multiplied the number of feet therein by the number of chains in the distance, and divided the product by the number of feet in a mile, and that he estimated "something like 5000 to 5280 feet" in a mile; *Held*, that the evidence as to the distance was not so conclusive as to render harmless an error in overruling the objection of the defendant to a juror who was disqualified under the statute by having formed an opinion. (*Page 97.*)

Constitutionality of Legislative Acts—When Courts will not Determine.—A court will not decide a question as to the constitutionality of a legislative act unless the cause in which it arises cannot be disposed of without deciding such question. (*Page 93.*)

APPEAL from Crawford county circuit court. *Reversed.*

Dodge & Johnson, for appellants.

D. B. Locke and *De E. Bradshaw*, for appellee.

BATTLE, J.—The demurrer of appellee to the answer of appellants presents four questions of law:

First. Is a person who goes upon the train of a railway company for the sole purpose of paying an overcharge for transportation if demanded, and bringing an action for the penalty prescribed by the statute in such cases, entitled to recover such penalty if the company demands and he pays the overcharge?

Second. Was appellee barred from recovering the penalty for such overcharge by reason of champerty?

Third. Are appellants entitled to any relief in equity on account of a mistake?

Fourth. Does their answer show that three cents a mile for the transportation of passengers is an unreasonable rate of compensation for the Little Rock & Fort Smith Railway?

1. The first question is decided in the affirmative in *Railway Co. v. Gill*, 54 Ark. 101, 47 Am. & Eng. R. Cas. 462. We adhere to the ruling in that case.

2. The "champertous" agreement between appellee and

his attorney, D. B. Locke, set out in the second paragraph of the answer, if available for any purpose, can only be set up when the agreement is sought to be enforced. The right of appellee does not grow out of it, but solely out of the fact that the railway company charged and received a greater compensation than that allowed by law. The company was not justified by the agreement in demanding and receiving the excessive compensation. How, then, could it be a good defense? No effort was made in this suit to enforce it. The right of action in this case is not dependent on or controlled by it. It could not, then, affect the right to the penalty. *Burnes v. Scott*, 117 U. S. 582; *Allison v. Railroad Co.*, 42 Iowa, 274; *Small v. Railroad Co.*, 55 Iowa, 582; *Brinley v. Whiting*, 5 Pick. 348, 3 Am. & Eng. Enc. Law, pp. 86, 87, cases cited.

Same—Cham-
pertous agree-
ment concern-
ing same.

3. The fact that appellants were mistaken as to the distance for which transportation was charged does not relieve them. Equity will not extend aid to any one on account of a mistake which is the result of culpable negligence. In *Duke of Beaufort v. Neeld*, 12 Clark & F. 248, 286, Lord CAMPBELL said: In no case has a court of equity “been successfully asked to interpose in favor of a man who wilfully was ignorant of that which he ought to have known,—a man who, without exercising that diligence which the law would expect of a reasonable and careful person, committed a mistake, in consequence of which alone the proceedings in court have arisen. No such a case is to be found, and it would be a reproach to the law if there had been such a decision.”

Same—Mistake
of distance as
affecting.

In *U. S. v. Ames*, 99 U. S. 35, Mr. Justice MILLER said: “Ignorance of the facts is often a material allegation, but it is never sufficient to constitute a ground of relief, if it appears that the requisite knowledge might have been obtained by reasonable diligence.”

Whatever limitations there may be upon the rule as to diligence stated in the authorities we have cited, it certainly applies where it is the duty of the party to make the inquiry and obtain the information. In this case appellants were prohibited from charging and collecting more than three cents a mile for carrying each passenger over the Little Rock & Ft. Smith Railway. It was their duty to the passengers travelling in their trains to ascertain the distance between the

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stations on their road, in order to protect them against the payment of excessive rates of fare. One of the appellants, the Little Rock & Ft. Smith Railway Company, acquired its road on the 8th of June, 1875, and charged and collected the alleged excessive rates in January, 1891,—more than 15 years after it came into possession of the road. It surely was not excusable for any mistake which was not induced by the appellee and his confederates, if for any.

The demurrer was overruled as to so much of the answer as is in these words: “And defendant says that if it has made an overcharge against plaintiffs it was induced to do so by the acts of the plaintiff and his co-conspirators, by the conspiracy and combination, as aforesaid, and it did so ignorantly, unintentionally, and by mistake; and that therefore it is not liable for violation of the statute, as charged herein.” If appellants were induced by the acts of appellee, and others acting in concert with him, to overcharge, they were allowed to set up that fact in their answer, and cannot, therefore, complain of the court depriving them of their defense in that respect.

4. Section 1 of the act of the general assembly of the state of Arkansas, entitled “An act to regulate the rates of charges for the carriage of passengers by railroads,” approved April 4, 1887, under which this action was brought, provides that it shall be unlawful for any railway whose line of railroad is over 75 miles long to charge for carrying any passenger over such line, within this state, more than three cents a mile.

Appellants allege in their answer that this rate is unreasonable as to the Little Rock & Ft. Smith Railway, is in violation of the constitution of the United States and of the state of Arkansas, and as a reason for so alleging says: “This defendant would show that under the terms and rates prescribed by said statute it cannot keep up, maintain, and operate its railway except at a heavy loss; that its line of railway is located wholly within the state of Arkansas, and is one hundred and sixty-seven miles in length, running between the cities of Little Rock & Ft. Smith; that the traffic and business over the same, both in passengers and freight, is so small and unremunerative that it cannot and has not been able to operate

Statute in case
at bar.

Same—Sufficiency of answer in action upon statute.

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its railway under said statute as aforesaid without an actual loss. Defendant therefore says and charges that said statute forbidding this defendant from charging any one passenger a greater rate than three cents a mile is entailing a great and daily loss upon this defendant, which will in the end amount to a total confiscation and destruction of its property, rights, and franchises, because of its inability, under such rate, to pay the interest upon its just debts, and the cost of maintaining and operating its railroad in a safe and proper condition."

Is the constitutional question sought to be raised by the defendant's answer presented in such a manner as to make it the duty of this court to decide it? It is not, unless it appears that this cause cannot be disposed of without deciding it.

As to the duty of courts to decide questions affecting the validity of acts of the general assembly, Judge COOLEY says: "Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extrajudicial disquisition is entitled. In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet, if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when, consequently, a decision upon such question will be unavoidable."

Constitution-
ality of legis-
lation—When
courts will
pass upon.

Have the appellants presented the question as to the validity of the act of April 4th in such a manner as to make

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it our duty to pass upon it? The right of the legislature to fix the maximum rates of compensation for the transportation of persons and property by railways is unquestioned. *Dow v. Beidelman*, 49 Ark. 325. But it is said that the court can inquire into the reasonableness of such rates, and, finding them unreasonable, can declare the act fixing them unconstitutional. Assuming that this contention is correct, the presumption is that they are reasonable, and the burden is on the appellants to affirmatively show that, as to them, they are not. Have they done so?

Same—Rule
applied to
facts at bar.

The Little Rock & Ft. Smith Railway Company alleges that it cannot keep up, maintain, and operate its railway under the act of April 4, 1887, except at a heavy loss. Why? Two reasons are given: (1) Because "the traffic and business over the same, both in passengers and freight, is so small and unremunerative that it cannot and has not been able to operate its railway under said statute as aforesaid without an actual loss"; and (2) "because of its inability under such rate to pay the interest upon its just debts and the cost of maintaining and operating its railroad in a safe and proper condition."

In *Reagan v. Trust Co.*, 154 U. S. 362, which was an action against state railroad commissioners to restrain the enforcement of rates, charges, and regulations prescribed by them, because they were unjust and unreasonable, a demurrer to the bill was filed. Mr. Justice BREWER, in speaking of general allegations in the bill similar to those contained in appellants' answer, said: "There are often, in pleadings, general allegations of mixed law and fact, such as of the ownership of property and the like, which, standing alone, are held to be sufficient to sustain judgments and decrees, and yet are always regarded as qualified, limited, or even controlled, by particular facts stated therein. It would not, of course, be tolerable for a court administering equity to seize upon a technicality for the purpose or with the result of entrapping either of the parties before it. Hence we should hesitate to take the filing of the demurrers to these bills as a direct and explicit admission on the part of the defendant that the rates established by the commission are unjust and unreasonable."

Reasonable-
ness of rates.

The rule, as stated by Mr. Justice BREWER, applies forcibly

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in this case. Appellants attempt to show, in their answer, the unreasonableness of the rates fixed by the statute in two sentences. In the first they make the general allegation "that under the terms and rates prescribed by said statute it [railroad company] cannot keep up, maintain, and operate its railway except at a heavy loss." In the second sentence they repeat the same allegation as follows: "That said statute forbidding this defendant from charging any one passenger a greater rate than three cents a mile is entailing a great and daily loss upon this defendant, which will, in the end, amount to a total confiscation and destruction of its property, rights, and franchises." After making the first general allegation, they specialize or state the particular facts as follows: "The traffic and business over the same, both in passengers and freight, is so small and unremunerative that it cannot and has not been able to operate its railway under said statute as aforesaid without an actual loss." Why state these facts? Obviously to show in what way the loss occurred,—to show the reasons for making the general allegation. They could serve no other purpose. To emphasize the reason they had already given, they expressly say that the reason they make the general allegation is "because of its [company's] inability under such rate to pay the interest upon its just debts and the cost of maintaining and operating its railroad in a safe and proper condition."

The general allegation in the answer as to the effect of the act of April 4th upon the road, limited or controlled by the particular facts, therefore means that the road could not be operated without loss, because the traffic and business over the same are too small and unremunerative to pay the interest upon its just debts, and the cost of maintaining and operating it in a safe and proper condition.

According to this interpretation, the answer does not show, directly or indirectly, expressly or impliedly, or in any other manner, that the rate of three cents a mile for the transportation of passengers is unreasonable. As to the transportation of property, our attention has not been called to, and we have failed to find, any statute fixing rates. The fact that the business and traffic are small and unremunerative does not show that the passenger rate of three cents a mile is unreasonable. That might be so, and a rate which would defray the expenses of

Reasonable-
ness of rates
continued.

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operating the road or make it profitable would be exorbitant and oppressive to the shipper and passenger, and unreasonable. In other words, it might be so, and no reasonable rate would be sufficient to defray expenses.

The additional fact that the traffic and business of the road, when operated according to the act of April 4th, and no passenger was charged exceeding three cents a mile, would not pay the interest on the debts of the railway company and the expenses of operating the road, does not show that the maximum passenger rate of three cents a mile is unreasonable. Rates of transportation sufficient to enable the road to realize a sum sufficient to defray current repairs and expenses and a profit on the reasonable cost of building the road and equipping it ought to be reasonable. The earnings of a road might be sufficient for this purpose, and yet not large enough to pay expenses and interest on its debts. Large and unnecessary debts might have been contracted through extravagance, enormous salaries, and mismanagement, exceeding the cost of building and equipping the road, and bearing a rate of interest amounting to more than a reasonable profit on the capital necessary, when judiciously expended, to construct and equip the road. Like some individuals as to their business, railway companies can reach a point through extravagance, losses, and mismanagement, when no reasonable rate or profit will enable them to maintain their roads and pay the interest upon their debts, and when failure and a sale of the road to other parties become inevitable.

Appellants further allege that the act of April 4th was unreasonable in fixing the rate for the carriage of a passenger at three cents a mile in this: that the actual cost and expenses of transporting each passenger and his baggage over the Little Rock & Ft. Smith Railway are more than three cents a mile, and that by reason thereof the company operating the road is compelled to transport passengers at a loss. To dispose of this defense, it is sufficient to quote from the opinion in *Railway Co. v. Gill*, 54 Ark. 112, 47 Am. & Eng. R. Cas. 462, as follows: "It [railway company] can only claim a profit from the operation of its entire line, and attack as unjust an act that denies it the right to fix such rates as will yield a profit upon its aggregate business."

Same—Text of
reasonable-
ness.

Same—Actual
cost of trans-
portation as
test.

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The demurrer was properly sustained.

5. The jury which tried the issues in this action were selected from the jurors who were impaneled for the term at or during which this cause was tried. Upon an examination under oath touching their qualifications as jurors they severally stated that they had sat as jurors in a number of cases tried at said term, "wherein several different plaintiffs had sued the defendants for certain sums of money as penalties under the statutes of Arkansas for violations of the law by the defendants by making alleged overcharges in passenger fares between Alma and Dyer and Dyer and Alma and other points on defendant's railroad; that they knew that there was a large number of cases, in character similar to this, pending in the court in which this action was tried; that a large number had been tried; and they had opinions as to the merits of all the cases tried before them, and as such jurors they had rendered verdicts upon the facts and issues brought before them." Four of them were plaintiffs in actions against the appellants in which the issues were the same as those involved in this suit.

Qualification
of juror.

To the impanelling of them as a jury the appellants objected, and their objection was overruled. In this the court erred. The jurors objected to were incompetent to sit as a jury in this action. The law of this state provides that "no person who has formed or expressed an opinion concerning the matter in controversy, in any such suit, which might influence the judgment of such person, shall be sworn in the same case as a juror." Sand. & H. Dig. § 4257.

The main issue in this case was the distance between Alma and Dyer. The question was, is the distance between these two stations less than the number of miles for which appellee paid appellants for transportation from Dyer to Alma? They had tried this issue and returned verdicts at the same term of the court at which this case was tried. It was virtually the only issue in the actions tried. They had necessarily formed and expressed an opinion concerning the matter in controversy in this suit, under circumstances which affected their judgment in this case: "The law presumes them to have been under a disqualifying bias, and the objection" of the appellants should have been sustained. *Garthwaite v. Tatum*, 21 Ark. 336.

But appellee insists that this error was not prejudicial to the

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appellants, because the evidence in the case was such as to prevent the jury from coming to any conclusion other than that contained in their verdict. Is this true? J. E. Broom, who testified in behalf of appellee, was the only witness who testified as to the distance between Dyer and Alma. Upon the correctness of his testimony the verdict depended. He testified that he was not a surveyor, but that he had measured the railway from Dyer to Alma, with a chain called a "surveyor's chain." He did not know whose chain it was, nor the length of it; but at the time he measured the distance he measured the chain (how is not shown), and multiplied the number of feet in a chain by the number of chains in the distance between the stations, and divided the product by the number of feet in a mile. When asked how many feet did he estimate were in a mile, he answered, "something like 5000 feet,—5280 feet."

His testimony was unsatisfactory, and an unbiased jury could well have refused to accept his conclusions as correct. At first it seems he could not state the number of feet in a mile, but at last did say 5280; and, notwithstanding he stated the number of feet, and the distance between the stations named, he could not or did not tell how long the chain was which he used in measuring. He stated that he did not remember. The fact upon which the issues mainly depended he could not state, but testified as to his conclusions, and his testimony was such that the correctness of his conclusions could not be determined. Under these circumstances we cannot say the selection of the jury was not prejudicial to appellants.

For the error indicated the judgment of the circuit court is *reversed*, and the cause is remanded for a new trial.

BUNN, C.J., and WOOD, J., concur in judgment on the ground of disqualifying bias of the jury, but dissent as to the insufficiency of the pleading, holding that the answer is sufficient on demurrer, the defects complained of to be reached by motion, and holding that the plaintiff is not shown to be a party aggrieved, as contemplated by the act.

GREAT NORTHERN RAILWAY CO.

v.

PALMER.

(Queen's Bench Division, Feb. 12, 1895.)

Tickets and Fares [(1) p. 108.]—Conditions on Ticket [(2) p. 110.]—Use of Ticket at Station beyond which it is Available—Forfeiture of Ticket.—The defendant, a passenger on the plaintiff's railway, purchased a special excursion ticket which entitled her to travel from Peterborough to Woodhall Spa, at a fare considerably lower than the ordinary fare; the ticket contained a condition that if it was used for any other station it would be forfeited, and full fare would be charged. The defendant traveled to and returned from Horncastle, a station beyond Woodhall Spa, paying the ordinary fare for journeys between Woodhall Spa and Horncastle; the total amount paid by the defendant was, however, much less than the ordinary return fare between Peterborough and Horncastle.

Held, that the condition of the ticket was applicable to stations beyond that named thereon as well as to the intermediate stations; that as the defendant had used the ticket for a journey to a station other than that named upon it, and not merely for a journey from and to the stations for which it was available, the railroad company was therefore entitled to treat the ticket as forfeited. (Page 102.)

APPEAL from the judge of the Huntingdon County Court.

On August 4, 1894, the defendant took at Peterborough a return ticket from Peterborough to Woodhall Spa; the ticket was a cheap excursion ticket available Facts. for the outward journey on the day of issue only, and for the return journey up to August 7; the price was 4s. 6d. Upon the face of the ticket in the bottom corner were the words "See back" in small print, and on the back, also in small print, were the words, "if used for any other train or station than that named this ticket will be forfeited and the full fare charged."

The defendant travelled by the excursion train to Woodhall Spa and went further on to a station called Horncastle, the fare to which place from Woodhall Spa is 5½d., and tendered at Horncastle the outward half of her excursion ticket together with the sum of 5½d., which was refused by the ticket collector. On August 7 she returned, paying 5½d. for a ticket from Horncastle to Woodhall Spa, and using the return half of her excursion ticket for the distance between Woodhall

Conditions on Ticket Great Northern Ry. Co. v. Palmer

Spa and Peterborough. The ordinary single fare from Peterborough to Woodhall Spa is 3s. 11½d., and the return fare 7s. 11d.; the ordinary single fare from Peterborough to Horncastle is 4s. 5½d., and the return fare 8s. 11d.

The plaintiffs claimed to be entitled to treat the ticket issued to the defendant as forfeited, and brought this action to recover the full return fare from Peterborough to Horncastle and back, or in the alternative the difference between that sum and the amount actually paid by the defendant. The defendant paid into court 5½d. in respect of the journey from Woodhall Spa to Horncastle, which sum had been tendered by her on her arrival at Horncastle, but refused.

It was admitted that the defendant, who did not appear at the trial in the county court, had acted bona fide under the belief that she was entitled to use the ticket as she had done.

The learned county judge nonsuited the plaintiffs, but gave leave to appeal. Upon the appeal the plaintiffs only asked for judgment for the difference between the fares, and did not ask for the full fare payable on the ticket being forfeited.

C. A. Russell, for the plaintiffs.—The contract between the parties only entitled the defendant to travel from Peterborough to Woodhall Spa and back, and she actually travelled on a journey other than that contracted for.

Brief of plaintiff.

She used the ticket for a station other than that named on it, and under the condition of which (in the absence of a finding to the contrary) she must be held to have had notice, the ticket was forfeited. The learned judge was wrong in holding that the condition only applied to the use of the ticket at an intermediate station, and not at a station beyond that to which it was issued; it applies to all stations other than that named on it. If it is open to the defendant to contend that she had no notice of the condition, it is submitted that the plaintiffs took all reasonable measures to bring knowledge of it home to the plaintiff. He cited *Great Northern R. Co. v. Winder*, 2 Q. B. 595; *Reg. v. Frere*, 4 E. & B. 598, 24 L. J. (M.C.) 68.

C. F. Pritchard, for the defendant.—The nonsuit was right. The defendant did not use the ticket for a journey to Horncastle, nor in part payment of the fare for such a journey. The contract between the parties was completely performed when the defendant reached Woodhall Spa, and she was then entitled to go on beyond that

Brief of defendant.

Great Northern Ry. Co. v. Palmer Conditions on Ticket

station, subject only to the right of the plaintiffs to prevent her from going on to Horncastle without a ticket. Even assuming that the condition on the back of the ticket was brought to the defendant's knowledge and formed part of the contract, she did not forfeit it by using it as she did, for the proviso that it is not to be used for "any other station" means any intermediate station between the termini named on the ticket; it does not apply to a station beyond that to which the ticket-holder is entitled to travel. But the plaintiffs did not do what was reasonably sufficient to give the defendant notice of the condition. [He cited *Great Western R. Co. v. Pocock*, 41 L. T. (N.S.) 415; *Richardson, Spence & Co. v. Rowntree*, A. C. 217.]

WILLS, J.—This case is, in my opinion, a very clear one upon the only point open to us, for I do not think that the question whether there was evidence to fix the defendant with notice of the condition arises for our consideration. Assuming that the indorsement upon the ticket formed part of the conditions of the contract between the parties, I think that the plaintiffs were entitled to treat the ticket and the money paid for it as forfeited; and although they are not taking that course, but are treating the money paid as having been paid in reduction of the fair between Peterborough and Horncastle, we must regard the case from the point of view of their right to claim the forfeiture.

Conditions on
ticket.

No one can doubt that the practice of railway companies in making special contracts for carrying passengers on special terms at low fares is a great boon to the community; and if a railway company running an excursion train at cheap fares to a place within a few miles of London were bound to treat that journey as part of a journey from the starting-point to London, and were therefore only able to charge a passenger travelling on beyond the terminus of the excursion to London the extra fare between those places, this most useful practice would be put a stop to.

When a passenger takes a special ticket to a named place and back at a cheap fare, the carriage of the passenger to that place and back is the only service which the railway company contracts to perform; it cannot, if the passenger goes on to another station, be treated as part of the service rendered by the company in

Use of ticket
beyond point
named
thereon.

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taking him to a place to which they did not contract to carry him.

In my judgment the practice is a right and reasonable one, and one which, on grounds of public policy, ought to be favored. I have no doubt that in the present case the condition formed part of the contract, and I am quite unable to see upon what ground a condition not to use a ticket for "any other station" than that named on it can be confined to intermediate stations; it is equally applicable to stations beyond the named terminus of the journey. I think that when the defendant went on beyond Woodhall Spa she was making a journey from Peterborough to Horncastle, and was not making a second and separate journey; whether she intended to do so or not at the time of taking her ticket is immaterial; the facts show that she elected to make a different journey to that for which she bargained.

I think, therefore, that her ticket was forfeited, and that the claim of the plaintiffs is good. The point as to bringing home notice of the condition to the defendant is, as I have said, not open to us; if it were, I am inclined to think that it would be a question whether the plaintiffs did do what was reasonably sufficient.

WRIGHT, J.—I agree. Though two questions might have been raised in this case, only one has been, and as to that I entirely agree with all that has been said by my brother Wills. But I cannot entirely pass over the other point; and if the defendant had appeared at the trial at the county court and had raised the point, I should have felt very serious doubt whether the plaintiffs had done enough to fix the defendant with notice of the condition. The words "See back" are not in a conspicuous place, and are in very small type; and the condition on the back is likewise in very small print. I should hesitate long before holding that the plaintiffs had done what was reasonable; but we cannot decide the point.

Concurring
opinion.

Appeal allowed.

Nelson, Barr & Nelson, Solicitors for plaintiffs.

Young & Sons, Solicitors for defendant.

Same—Forfeiture of ticket.

NEW YORK & NEW ENGLAND RAILROAD CO.

v.

FEELY (J. J.).

(*Supreme Judicial Court of Massachusetts, Mar. 1, 1895.*)

Tickets and Fares. [(1) p. 108]—**Season-ticket.** [(2) p. 110].—**Rights of Holder—Evidence.**—Where an action is brought by a railroad company to recover the fare for a trip to which the defendant claims he was entitled under a season-ticket held by him, it is proper for the railroad company, in order to show that the passenger did not have the right to take the trip in question, under the contract in his season-ticket, to introduce a schedule of trains in force at the time the trip was taken, to show that the train upon which the defendant rode did not regularly stop at his destination. (*Page 104.*)

Same—Same—Taking Wrong Train by Mistake.—A season-ticket holder who embarks upon a train under the belief that such ticket is good thereon, is not entitled to the benefit of the rule that one who by mistake takes a wrong train is not obliged to pay for his ride thereon to the first station at which he has an opportunity to alight. (*Page 104.*)

Same—Same—Previous Acceptance of Season Ticket on Certain Trip—How far a Waiver of Right to Fare for Subsequent Like Trip.—The fact that a season-ticket holder had been informed that his ticket entitled him to ride upon a certain train, and that the conductor thereof had, on occasions, accepted such ticket for such passage, does not constitute a waiver, by the railroad company, of the contract or condition upon the ticket that it shall not be good for passage upon that train, but is merely a waiver of the right of the railroad company to collect cash fares for such rides as were actually taken on the ticket. (*Page 104.*)

EXCEPTIONS from Suffolk county superior court. *Overruled.*

Action to recover the amount of fare which defendant had refused to pay on the ground that he was entitled to the trip upon his season ticket. Exceptions by defendant to certain evidence and to refusal of ruling of law requested.

F. A. Farnham, for plaintiff.

T. E. Grover, for defendant.

BARKER, J.—The defendant's exception to the admission in evidence of the schedule of trains issued on May 7, 1893, and in force when the defendant enjoyed the ride for which

Season-Tickets New York & New England R. Co. v. Feely

the plaintiff asks pay, must be overruled. It was not merely a declaration, but an act designating the train which the defendant took as a train which did not stop regularly at Walpole; and so an act designating that train as one on which the defendant did not have the right to go, under the contract set out upon his season-ticket.

Nor can the defendant invoke the doctrine that a passenger who, by mistake, takes a wrong train, is not obliged to pay for his ride to the first station at which he has the opportunity to alight. He boarded the train intending to ride upon it as a passenger, for pay, to the station at which he left the train; and his mistake in supposing that a coupon from his season-ticket would be received in compensation did not render him less liable to pay for the service to which he intended to subject the plaintiff, and which it performed as he had expected. Having intended to ride upon that train from Boston to Walpole, he became a passenger, upon the footing that he was to make compensation for the service rendered; and the question is whether the tender of the coupon was a proper offer of compensation.

If upon two previous occasions, as the defendant's evidence tended to prove, and the plaintiff's evidence tended to disprove, the conductor had accepted coupons from his season-ticket for passages upon this train from Boston to Walpole, the acceptance of the coupons did not show a waiver of the contract that the ticket should not be good for passage upon that train, but merely a waiver of the plaintiff's right to collect cash fares for those two rides.

When he took the train on this occasion, all his conversation with the gatekeeper consisted in his own question, "Walpole?" and the gatekeeper's answer, "Yes." He said nothing to the gatekeeper about his intention to use his season-ticket in payment of his fare to Walpole, and all that the answer could justify him in believing was that a passenger could use the train for a passage to Walpole. He was not told on this occasion that his ticket was good, and, if he had been so told by a gatekeeper upon a former occasion, it was competent for the trial court to find that the statement was a waiver of the condition of the ticket for that passage only.

The ruling that the gateman or the brakeman could not waive any of the printed conditions of the ticket was one which we cannot say is shown by the exceptions to have been erroneous; and the third ruling requested was allowed by the court, except that, in connection with it, the ruling just mentioned was made.

These considerations show that the rulings of law requested and refused were properly refused, because not well founded in law upon the facts as established in the view of the trial court.

Exceptions overruled.

THOMPSON (Josephine C.)

v.

TRUESDALE (Receiver, etc.).

(*Supreme Court of Minnesota, May 15, 1895.*)

Tickets and Fares [(1) p. 108]—Commutation Ticket [(2) p. 110]—Condition Against Detachment of Coupons by Passenger—Waiver.—On a commutation ticket, and the coupons thereof, was printed a provision to the effect that the ticket was not good unless the coupons were detached by the conductor. *Held*, considering the fact that when the ticket was issued this condition formed a part of the contract, it was competent for the parties to subsequently waive it, and that the practice of receiving as fare, coupons detached by the passenger without the presentation of the rest of the ticket, is evidence of such waiver. (*Page 107.*)

Same—Same—Same—Right of Carrier to Revoke Waiver of Conditions.—Although a carrier has the right to revoke his consent to a waiver of the condition upon a ticket against the detachment of coupons by a passenger, and may do so even after he has so received some of the detached coupons, yet it is the duty of the carrier to give reasonable notice of such intended revocation; and if without such notice, and relying upon such waiver, the holder of a ticket detached a coupon and took it with her upon the train without taking the rest of the ticket, according to a practice long acquiesced in, the carrier cannot, when such coupon is presented for fare, immediately revoke his consent to such waiver so as to deprive the passenger of the use of the coupon, or compel the payment of extra fare. (*Page 107.*)

Same—Same—Same—General Custom Between Carrier and Passenger, as Evidence of Employee's Authority to Waive Conditions.—The fact that a general custom prevailed between a carrier and his passenger to waive these conditions in this class of tickets tends to prove that the conductors on the trains had authority so to waive the conditions. (*Page 108.*)

Conditions on Ticket

Thompson v. Truesdale

Appeal from Hennepin county district court. *Affirmed.**A. E. Clark* and *W. F. Booth* for appellant.*A. H. Hall* and *F. W. Reed* for respondent.

Facts. CANTY, .J—In the summer of 1893 the plaintiff resided with her husband and family at Fairview,—a station on the line of the Minneapolis & St. Louis Railroad, 17 miles from Minneapolis, on the shore of Lake Minnetonka. On August 2d of that year she took the regular passenger train on said railroad at Minneapolis to ride to Fairview, and tendered to the conductor, in payment of her fare, a detached coupon of a commutation ticket, which he refused to receive for the reason that it was detached, and demanded that she pay the regular fare, which she refused to do, and thereupon he ejected her from the train.

This action is brought by her, against the receiver operating the railroad, to recover damages for trespass in being thus ejected.

Plaintiff recovered a verdict, and from an order denying his motion for a new trial the defendant appeals.

The defendant pleaded as a defense to the action: That prior to said day he issued and placed on sale a commutation ticket which entitled the purchaser and holder thereof to 10 rides over said railroad between Minneapolis and Excelsior,—a station one mile beyond Fairview. That, in consideration of the compliance by the purchaser and holder thereof with the provisions and conditions therein contained, he transported the holder thereof for the reduced fare of 30 cents per trip, whereas the regular fare was 54 cents per trip. That on the cover of said 10-trip ticket, among other conditions, is printed the condition: "It (the 10-trip ticket) must be presented to the conductor on each trip for detachment; otherwise ordinary fare will be charged." And on each coupon is printed the words, "This coupon is good for one ride between Minneapolis and Excelsior, in either direction, but must be detached by the conductor only, or it will not be accepted for passage."

That plaintiff tendered as aforesaid a coupon detached from one of the said 10-ride tickets, refused to produce or exhibit to the conductor the original ticket from which the coupon had been detached, or to pay her fare, and was for these reasons ejected from the train.

In her reply the plaintiff admitted that the ticket from which the coupon which she presented was detached was in the form, and contained the provisions and conditions alleged, and was sold for the price alleged; but she avers that for a long time prior thereto the defendant waived these conditions in such tickets, by continuously, and as a regular custom, receiving such detached coupons from her and other passengers holding such tickets, presenting such coupons without producing the book. There was sufficient evidence received on the trial to establish such custom, both as to plaintiff and other passengers.

But it is contended by appellant that the ticket, and each coupon thereof, constitute an express contract between the parties, which cannot be varied or contradicted by proof of waiver, and that the conductors on the trains have no power to waive such conditions, or set aside the express provisions of contract made by their superiors, or establish a custom to that effect.

Conceding, without deciding, that the conditions printed on this ticket and coupon should be given the same force and effect as if they were contained in a written contract signed by the parties, still it was competent for the parties, by a subsequent agreement, to waive these conditions.

Waiver of conditions on ticket.

Evidence of a practice on the part of defendant to waive the conditions of the particular ticket, and receive the detached coupons thereof without presentation of the rest of the ticket, was competent to prove his consent, given subsequent to the purchase of the ticket, that such conditions be dispensed with.

Same—Evidence of custom as showing waiver.

And, conceding that he had a right to revoke such consent after he had so received some of the detached coupons, it was his duty to give reasonable notice of his intended revocation. If, without such notice, and relying on such waiver, the plaintiff detached the coupon in question, and took it with her on the train, leaving the rest of the ticket at home, the defendant could not, when such coupon was presented, revoke such consent, so as to deprive her of the use of the coupon, or compel her to pay extra fare.

Same—Notice of revocation of waiver.

Whether or not the placards which, it is claimed, had been

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posted in the cars, gave plaintiff sufficient notice of such intended revocation, was a question for the jury.

The fact that a general custom existed between defendant and his passengers on these lake trains to waive and disregard these conditions in this class of ticket tended to prove that the conductors on the trains had authority to waive such conditions. It was the duty of the defendant to know what his conductors were openly and frequently doing. *Railway Co. v. Kolb*, 73 Ala. 404, 18 Am. & Eng. R. Cas. 512; *Railroad Co. v. Wheeler*, 35 Kan. 185, 26 Am. & Eng. R. Cas. 173; *Railroad Co. v. Dickson*, 143 Ill. 368; *Lucas v. Railway Co.*, 33 Wis. 54. It has frequently been held that, as between him and the passengers under his charge, the conductor represents the company, and can waive conditions in the contract for transportation.

This disposes of the case, and the order appealed from is *affirmed*.

ABSTRACTS OF RECENT DECISIONS

(1) *Tickets and Fares—Contract of Carriage* [(1) p. 110]—*Duty of Company to Stop Train at Station not Scheduled*.—When a railroad company sells a ticket from one point to another on its own line, it simply engages to carry the passenger to his destination in the customary way, and according to the reasonable rules and regulations which it has adopted for the running of its trains, and in the absence of a special contract to that effect, a passenger has no right to require a train to stop at a particular station, where, according to the regulations of the company, it is not scheduled to stop, and does not ordinarily stop. *Atchison, T. & S. F. R. Co. v. Cameron*, (U. S. Cir. Ct. of Appeals, 8 Cir.) 66 Fed. Rep. 709.

Same—Decision of Conductor on Validity of Transfer Ticket—Ejection.—Where there is presented to a street-car conductor a transfer ticket having two holes punched therein, one showing that the holder is entitled to passage, and the other that the time within which the ticket may be used has expired, the conductor has no right arbitrarily to decide that the ticket is void, and for the refusal of the passenger to pay fare, eject him. *Dennis v. Pittsburg & C. S. R. Co.*, 165 Pa. St. 624.

Same—Statements by Ticket Agents—Binding Effect on Company.—Where persons seek to enlarge the obligation which a carrier assumes by selling tickets, by showing oral statements made by a ticket agent, the proof should be confined to statements made by the agent contemporaneously with the purchase of the ticket.

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Hence, statements made by an agent three weeks prior to the time the ticket was sold that the train stopped at a designated station are not binding upon the company. *Atchison, T. & S. F. R. Co. v. Cameron*, (U. S. Cir. Ct. of Appeals, 8 Cir.) 66 Fed. Rep. 709; *citing Hostetter v. Railroad*, (Pa.) 11 Atl. Rep. 609, 32 Am. & Eng. R. Cas. 549.

Same—Liability for Statements made by Ticket Agent of Connecting Line.—To hold a connecting line liable in damages for representations made by a foreign ticket agent as to the movement and stopping points of trains on its road, which are incorrect and different from information given by the published time cards of the company, its liability should be limited to representations practically coincident with the purchase of the ticket. *Atchison, T. & S. F. R. Co. v. Cameron*, (U. S. Cir. Ct. Appeals, 8 Cir.) 66 Fed. Rep. 709.

Same.—Sale of Ticket to Station on Connecting Line.—The selling of a ticket to a station on a connecting line imposes no obligation upon the latter to stop a through train at a station for which the ticket was sold, and the selling of the ticket will not in itself amount to an assurance that the purchaser will be carried through to his destination on that train without change of cars. *Atchison, T. & S. F. R. Co. v. Cameron*, (U. S. Cir. Ct. of Appeals, 8 Cir.) 66 Fed. Rep. 709.

Same—Liability of Company for Failure to Transport Passenger on Ticket Issued by Connecting Line.—A railroad company cannot be called upon to answer in damages for the failure to carry a passenger on a ticket issued by another company, in the absence of any allegation in the complaint that the issuing company was a joint contractor, or had the right to issue the ticket. *Matthews v. Charleston & S. R. Co.*, 38 S. Car. 429.

Same—Rights of Purchaser of Ticket—Payment of Fare from Point other than that Designated by Ticket.—The purchaser of a ticket entitling him to passage from one point to another, who, because the train did not stop at one of the points, goes to another station and boards a train for his objective point, is bound to pay the difference in the fare from the point where he boards the train to the point from whence his ticket entitles him to passage. *Illinois Cent. R. Co. v. Billington*, (Ky.) 30 S. W. Rep. 885.

Same—Liability of Company for Failure to let Passenger off at other than Regular Station.—A passenger cannot complain of the refusal of a railroad company to allow her to leave a train at a flag station, which is not the destination named in her ticket, notwithstanding that previously she had been permitted to take passage and leave trains at such station, in the absence of any allegation in the complaint that it ever was the custom of the company to accommodate its passengers in that manner. *Matthews v. Charleston & S. R. Co.*, 38 S. Car. 429.

Same—Validity of Contract by Company and Shipper Traveling with Stock.—A written contract with a railway company, signed by

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a shipper of live stock, providing that such shipper, while being carried upon the train transporting his stock, shall remain in the caboose car attached to the train while the same is moving, is valid and binding between the parties thereto. Such a contract is a reasonable one, intended for the safety and convenience of the shipper, as well as for the protection of the railway company carrying him. It does not contravene any law or a sound public policy. *Ft. Scott, W. & W. R. Co. v. Sparks*, (Kan.) 39 Pac. Rep. 1032.

(2) **Conditions on Tickets** [(2) p. 112]—*Power of Company to Exact Conditions from Passenger—Georgia Statute.*—According to the Code (section 2068), a common carrier cannot limit his legal liability by any notice or entry on tickets sold. Without making an express contract with the passenger, a railroad company cannot, after selling a return ticket, and receiving pay therefor, exact of the passenger, as a condition of returning on the ticket, that he shall sign it, and that the signature shall be attested by a given agent, who shall stamp it. This is true, although the ticket delivered to the passenger be sold at a reduced price, and limited as to time, and may indicate on its face that it is to be signed, attested, and stamped, and that it cannot be used unless these requisites be complied with. *Phillips v. Georgia Railroad Banking Co.*, 93 Ga. 356.

Binding Effect of Conditions on Street Railway Transfer Check.—Where a passenger in a street car makes a timely request for a transfer check and it is not given to him until just as he is in the act of leaving the car, he is not bound by conditions printed on the back thereof, and with which he has had no reasonable opportunity to acquaint himself. *Dennis v. Pittsburgh & C. S. R. Co.*, 165 Pa. St. 624.

Free Pass—Binding Effect of Conditions on.—A person receiving a ticket for free transportation is bound to see and know conditions printed thereon, which the carrier may see fit to impose. *Muldoon v. Seattle City R. Co.*, 10 Wash. 311.

Estoppel of Public Official to Deny Validity of Free Pass Issued to Him.—A person holding a free pass who receives injuries while riding thereon is estopped to assert that the pass is void because given to him as a public officer in violation of a constitutional provision which forbids transportation companies to grant passes to such officers. *Muldoon v. Seattle City R. Co.*, 10 Wash. 311.

NOTES

(1) **Tickets and Fares—Contract of Carriage—Rights of Purchaser.**—The purchase of a ticket constitutes a contract between the company and the passenger in accordance with which the former undertakes to carry the latter to his destination, on the particular train he takes, and no other, unless he is permitted by some regulation of the company, upon compliance with some condition, to stop over at

an intervening station and resume his journey by another train. The contract for the transportation of the passenger is an entirety, and if, without the consent of the company, he stops before reaching his destination, he cannot again impose the obligation of the contract upon the company by insisting that he shall be carried the remainder of the journey. *Stone v. C. & N. M. R. Co.*, 47 Iowa, 82.

Where a person purchases a ticket and takes passage upon a railroad train, and after the train starts upon the road gives up his ticket to the conductor, he cannot, at an intermediate station, by virtue of his subsisting contract, leave such train while the company is reasonably performing the contract, and claim a seat upon another train. *Cleveland, C. & C. R. Co. v. Bartram*, 11 Ohio St. 457.

When a passenger purchases a ticket, he only acquires the right to be carried, according to the custom of the road, to the place for which his ticket calls, on any train that usually carries passengers to that place. He acquires no right to insist that the company shall carry him out of the customary course of its road, and it is his duty, when he obtains his ticket, to inform himself as to the usual mode and course of travel on the road. *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510; *Beauchamp v. International & G. N. R. Co.*, 56 Tex. 239, 9 Am. & Eng. R. Cas. 307, and cases cited.

Where a passenger having a ticket to a certain station takes passage upon a train which, under the regulations of the company, does not stop at that station, the fact that the conductor takes up the ticket, and agrees to stop the train and let the passenger alight at such station, will not bind the company. *Ohio & M. R. Co. v. Hatton*, 60 Ind. 12.

In such a case, and where the passenger has a ticket containing a stipulation that it is "good only on trains stopping at stations named," and he is informed by the conductor that that train does not stop at the station named on such ticket, the passenger cannot infer any right on the part of the conductor to agree to stop at such station, merely because the conductor took up the ticket. *Ohio & M. R. Co. v. Hatton*, 60 Ind. 12.

As between the conductor and the passenger, the latter's ticket is conclusive evidence of the extent of his right to travel, and he must produce it when called on, as the evidence of his right to the seat he claims. *Fredericks v. Marquette, H. & O. R. Co.*, 37 Mich. 342.

The methods generally adopted by common carriers of passengers to carry on business successfully, must be regarded in determining the duties of conductors and the rights of the passengers. *Id.*

An offer to pay fare to an employé of a train who is unauthorized to receive fares, is not an offer to the company, and does not entitle the person to the rights of a passenger who has paid fare. *Cleveland, C. & C. R. Co. v. Bartram*, 11 Ohio St. 457.

Same—Duty of Railroads to Keep Ticket Offices Open for Sale of

Conditions on Ticket

Notes

Tickets.—Where a railroad company adopts a rule prohibiting passengers from being carried on its trains without tickets, it must keep open its ticket offices a reasonable time in advance of the hour fixed for the departure of trains. Should it fail to do so, a person desiring to take passage will have the right to enter a car and be carried to his place of destination, on paying the regular fare to the conductor. *Illinois Central R. Co. v. Johnson*, 67 Ill. 312.

Railroad companies are required to keep open their offices for the sale of tickets to passengers for a reasonable time before the departure of each train, and up to the time fixed by its public schedules for such departure, and not up to the time of the actual departure of trains. *St. Louis, A. & T. H. R. Co. v. South*, 43 Ill. 176.

What is reasonable time to keep a ticket office open for the sale and purchase of tickets is a question for the jury. *Du Laurans v. First Division, St. Paul & P. R. Co.*, 15 Minn. 49, and cases cited.

Where a ticket is applied for, but because the supply of tickets is exhausted, or for other reason, the same is not furnished, that fact may be shown by the ticket agent, and his certificate of it should be evidence to the train conductor of the fact that the passenger was not in fault for not having a ticket. *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 352.

(2) **Conditions on Tickets.**—The purchaser of an excursion ticket which contains a stipulation that it shall be "good for one passage, on the day sold only," cannot lawfully claim a passage under it at any time except on the day designated thereon. *State v. Campbell*, 32 N. J. L. 309.

The words "good on passenger trains only" contained on a ticket issued and sold by a railroad company to a passenger, do not amount to an agreement that all of its passenger trains will stop at the stations designated on the ticket. *Ohio & Miss. R. R. Co. v. Swarthout*, 67 Ind. 567.

In *Boice v. Hudson River R. Co.*, 61 Barb. (N. Y.) 611, it was held that where a person purchases from a railroad company a passage ticket, bearing upon its face the words "good for this day only," with the date indorsed, such ticket will not entitle the holder to ride in the company's cars on a day subsequent to its date, for the reason that such ticket is to be regarded as the evidence of the contract made by the company to carry the holder.

Verbal declaration of the company's ticket agent, made subsequent to the purchase of such ticket as to its being good at any time thereafter, will not constitute a valid contract; in the absence of any proof that the agent had authority to make an oral contract for the company foreign to one indicated by the ticket. Such authority in the agent will not be presumed. *Id.*

A person purchasing a commutation ticket from a railroad company and given a receipt on which was a note that the ticket should be shown to conductors when required, and that no duplicate ticket would be issued, and upon which ticket it was printed that the

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ticket was held subject to the regulations prescribed in the receipt, is bound by his contract; and if by casualty the ticket has been lost so that he cannot produce it, the company may exact from him the regular fare paid by other passengers. *Ripley v. New Jersey, R. & T. Co.*, 31 N. J. L. 388.

ATCHISON, TOPEKA & SANTA FÉ RAILROAD CO.

v.

BROWN (David P.)

(*Court of Appeals of Kansas, November 11, 1895.*)

Ejection of Passenger for Nonpayment of Fare [(2) p. 158.]—**Liability of Company.**—One who enters a railway train for the purpose of becoming a passenger thereon, but who has no ticket for his passage, and who refuses, when properly demanded by the conductor, to pay the legal fare, becomes a trespasser, and it is his duty, when so requested, to voluntarily leave the train, when it has been stopped at a proper place for that purpose; and a refusal so to do justifies the servants of the railroad company in using such reasonable force to eject him as, under the circumstances, seems to be necessary. The company is not liable in damages for injuries sustained by such person in his being so put off the train when they were not wilfully inflicted, when improper methods were not used, and when the wrongful resistance of such person directly contributed to the injuries. (*Page 117.*)

Action for Ejectment—General and Special Findings.—Where the jury make both general and specific findings of facts in answer to numerous questions submitted to them by the parties to the action, and it can be seen that the general findings are mere conclusions drawn by the jury from the facts as found in answer to the specific questions, such general findings may be wholly ignored; and in such case, if the specific findings are consistent with each other, but do not sustain the general verdict, it is error to overrule a motion for judgment on the specific findings. (*Page 117.*)

ERROR from Atchison county district court. *Reversed.*

A. A. Hurd, for plaintiff in error.

Webb & Raymond, for defendant in error.

CLARK, J.—This was an action brought by the defendant in error, David T. Brown, against the plaintiff in error, the Atchison, Topeka & Santa Fé Railroad company, in the district court of Atchison county, to recover damages alleged to have been sustained by the plaintiff by reason of the wrongful acts of the servants, agents, and employés of

Case stated.

Ejection of Passengers A. T. & S. F. R. Co. v. Brown

the defendant in ejecting him from a passenger train of the defendant in said Atchison county on the 25th day of March, 1889.

The plaintiff alleges that prior to receiving the injuries complained of he was a physician, and earned the sum of \$3000 per year by the practice of his profession, and that as a result of said injuries he became permanently disabled, and rendered incapable of attending to any business whatever; that he incurred and expended the sum of \$100 for medical treatment and care; that he was confined to his bed and to his house by reason of said injuries for a period of about two months, during which time he was unable to attend to any business whatever; that his time during said period was well and reasonably worth the sum of \$500—and he prays damages in the sum of \$20,000. The jury returned a general verdict in favor of the plaintiff for \$250, the items of which, as shown by the answers to special questions to the jury, were as follows: For pain of body and mental anguish, \$140; for medicines, \$10; for the value of the services of the physicians who attended him while he was endeavoring to be cured of said injuries, \$100.

Answers were made by the jury to 128 special questions submitted by the parties to the action.

The record contains but little of the evidence, and only that part thereof relating to the value of the services of the physicians who attended the plaintiff, and the amount expended by him in way of medicines, nursing, etc., during the time he was confined to his house, or while he was suffering from the injuries received by him. The evidence supports the findings of the jury as to the value of the services of the physicians and the necessary expenses incurred by the plaintiff in addition to the medical attendance received.

The defendant moved for judgment on the particular questions of fact found by the jury, notwithstanding the general verdict, which motion was overruled by the court, and is the particular error complained of.

From the special findings of fact by the jury it appears that on or about the 25th day of March, 1889, at about 9:45 p. m.,

Facts. plaintiff below, Dr. David T. Brown, entered a car of the plaintiff in error at Atchison, to be transported from thence to Nortonville as a passenger, having in his possession at the time a ticket which he in good faith believed entitled him to such transportation; and when

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called upon by the conductor he offered said ticket for his fare, but as a matter of fact said ticket was not one entitling him to such transportation, and he was so informed by the conductor.

Neither did the defendant in error produce and present a ticket from Atchison to any station upon the plaintiff in error's railroad line, but the ticket so offered showed on its face that the holder was entitled to transportation over another and independent line of railroad from Atchison to Effingham.

The conductor then demanded of the defendant in error the regular fare from Atchison to Nortonville, which was 50 cents, but he refused to make such payment, although he was financially able, and had sufficient funds with him at that time, to have done so. He was then notified by the conductor that he must either pay his fare or get off the train; that, unless he made such payment, he would be compelled to stop the train and put him off.

The defendant in error then informed the conductor that if he got him off he would have to put him off. The train was then brought to a full stop, after which the conductor again requested him to pay his fare or get off the train without requiring force to be used, and informed him that he did not want to be compelled to lay hands upon him.

The defendant in error still refusing to leave the train, the conductor then lifted him out of his seat and pushed him along the aisle to the door of the car, and while so doing nothing was said to the plaintiff other than to request him to get off without inviting the use of force. The defendant in error refused to move himself of his own volition, or to go, except as he was moved along by the conductor or brakeman, or both. He refused to walk off the platform and down the steps in the ordinary way of getting off the car, and the conductor pushed him from the platform, a distance of from three or four feet to the ground, and he alighted on his feet and sank down to the ground. The brakeman took hold of his right arm and offered to help him up to his feet, but the defendant in error ordered him to let him alone, and declined any assistance.

The signal was then given to the engineer by the brakeman, as directed by the conductor, and the train was started on its course. Said removal from the train occurred about one-half mile from the limits of the city of Atchison. The weather was moderately fair, and the defendant in error walked back to the

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city that night. Dr. Lindley, of Atchison, was called to see him a few days thereafter, and pronounced his ailment of a temporary character. Neither the conductor nor the brakeman, in removing him from the train, had any motive in so doing other than to obey the rules and regulations made for them to follow in such cases. No complaint is urged, save in the manner of defendant in error's ejection from the platform of the car.

Facts—Continued. The jury found that the conductor pushed him from the platform without notice or warning of his intention to do so, or without regard to care as to whether or not he would be injured, and in so doing used more force than was necessary, but how much less force than was used would have accomplished the end desired does not appear.

It further appears that at the time of said ejection the defendant in error had in his arms and hands a basket of flowers, a bandbox, a valise, and a hat; yet the findings show that the momentum which he received by being so pushed was not sufficient to cause him to plunge forward when he alighted on his feet, but, instead thereof, he sank down to the ground; and this fact, coupled with the finding that neither the conductor nor brakeman had any malice towards the defendant in error, would negative the idea that any great amount of force was used, or, in fact, that much, if any, more force was used than was absolutely necessary to cause his removal from the platform of the car.

As was said by Hammond, J., in *Hall v. Railroad Co.*, 15 Fed. 57: "The courts will not, where the passenger is in the wrong, tolerate any nice discrimination about the force necessary to secure submission to the conductor's lawful authority, and overcome the resistance unless it may be where the conductor departs from the exercise of lawful force and beats, wounds, or maltreats the resisting passenger in the ill temper of belligerency. * * * A resisting passenger cannot expect the courts to erect delicate scales on which to weigh with exact nicety the force used to overcome his resistance."

Force used in ejecting passenger. It is difficult to ascertain from the findings of fact the precise nature of the injury received by the plaintiff below. The jury found that he was made "some sick, sore, and lame" by being pushed from the platform, and that a few days thereafter he passed bloody urine, which would indicate that the

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injuries were occasioned by the jar produced when his feet came in contact with the ground after being pushed from the platform, a distance of from three to four feet; but whatever injury he may have sustained was of a temporary nature, and so slight that the jury declined to make any allowance for injury to his person or for loss of time.

When the plaintiff below ascertained that the ticket held by him did not entitle him to transportation over defendant's railroad, it was his duty, upon request of the conductor, to either pay his fare or voluntarily leave the train after it had stopped at a suitable place for that purpose; and when he refused so to do he became a trespasser, and the conductor might lawfully eject him from the train. The injuries sustained by him were occasioned by his refusal to comply with the repeated requests, lawfully made by the conductor, that he pay his fare or leave the train without requiring the use of force. The train was stopped from three to five minutes for the purpose of removing him therefrom: surely ample time to have enabled him to have alighted with absolute safety. But the conductor was forced to lift him from his seat and push him along the aisle out on the platform, and when they arrived on the platform he refused to walk down the steps in the ordinary way of getting off a car. He seemed utterly indifferent as to whether or not he would receive any injury from the exercise of that force which he was inviting to cause his ejection, and probably entertained the erroneous idea that, in order to recover damages from the railroad company, it was necessary for him to at least passively resist being ejected, and that, if personal injury resulted therefrom, even by the exercise of ordinary care on the part of the employes of the railroad company, his claim for damages would be correspondingly increased.

When passenger becomes trespasser.

In *Railroad Co. v. Gants*, 38 Kan. 608, 34 Am. & Eng. R. Cas. 290, our supreme court held that, if a person is a trespasser on the train, the conductor has the right to eject him, and that the railroad company can only be made responsible for the injuries inflicted which are wilful, wanton, or malicious.

Trespasser may be ejected.

The jury in this case found that the conductor did not push the defendant in error from the platform wilfully or maliciously, but that he did so wantonly. The facts as disclosed by the other particular findings of the jury as above outlined sustain

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this general finding that such act was not done wilfully or maliciously, but do not, in our judgment, sustain the general verdict in favor of the plaintiff below, and they virtually negative the general finding that the conductor pushed the defendant in error from the platform wantonly; hence we do not hesitate to characterize such finding as merely a general conclusion incorrectly drawn by the jury from the other more specific findings of fact, and under the rule laid down in *Railroad Co. v. Plunkett*, 25 Kan. 188, 2 Am. & Eng. R. Cas. 127, such general finding or conclusion may be wholly ignored.

With this eliminated, the plaintiff in error was entitled to judgment on the special findings of facts, the general verdict to the contrary notwithstanding, and the court below erred in overruling its motion for such judgment.

Because of such error, the judgment of the court below will be reversed, and the cause remanded, with directions to enter judgment upon the special findings of facts in favor of the defendant in that court.

DECKER (S. B.)

v.

ATCHISON, TOPEKA & SANTA FÉ RAILROAD CO.

(*Supreme Court of Oklahoma, Sept. 7, 1895.*)

Carriers of Passengers [(1) p. 18]—**Right to Establish Rules** [(3) p. 22].—A railroad corporation has the right to establish reasonable rules and regulations for the government of its property. (*Page 122.*)

Same—Same—Ejection of Passengers [(1) p. 156]—On the 16th day of September, 1893, the defendant railroad company prescribed a certain rule for the government of its trains entering the Cherokee Outlet, which rule provided that no train should enter such outlet within six hours of twelve o'clock noon of said day, and that trains before entering such outlet should be stationed at the edge of said land thirty minutes before the hour of opening, and should not be entered by passengers earlier than thirty minutes before said hour of twelve o'clock noon. *Held* to be a reasonable rule, and that where a party is ejected from the trains of the defendant company for failing to comply therewith he cannot recover damages from such company for being so ejected. (*Page 123.*)

ERROR from Logan county district court. *Affirmed.*

Decker v. A. T. & S. F. R. Co. Ejection of Passengers

S. D. Decker and *P. O. Cassidy*, for plaintiff in error.

Henry E. Asp, *J. W. Shartel* and *J. R. Cottingham*, for defendant in error.

SCOTT, J.—This is an action commenced by the plaintiff in error, plaintiff below, in the district court of Logan county, against the defendant in error, the Atchison, Topeka & Santa Fé Railroad Company, for damages for the expulsion of plaintiff from the passenger train of the said defendant.

The petition alleges that on the morning of the 16th day of September, 1893, the plaintiff, who is a resident of the city of Guthrie, purchased a ticket from the defendant's agent at Guthrie, paying 90 cents therefor, by the terms of which said defendant bound itself to carry plaintiff from Guthrie to Wharton, without delays or stoppages other than those incident to the usual business of said defendant and its said road in the ordinary course of traffic; that, after purchasing said ticket, plaintiff boarded the regular north-bound passenger train, due at Guthrie at 5:45 o'clock a.m., and peaceably and quietly took a seat in one of defendant's coaches; that, when said train arrived at Orlando, the conductor in charge of said train stopped the same, and ordered plaintiff to leave said coach, and get off the train; that plaintiff refused to do so; that said conductor then, calling to his aid other employes of said train, assaulted plaintiff, and did then and there violently, unlawfully, forcibly, wilfully, and maliciously eject plaintiff from said train, and violently and wrongfully threw him to the ground, thereby subjecting him to great inconvenience, disgrace, outrage, and insult; that the health of plaintiff was very poor, and by reason of being so ejected he was compelled to stand for hours in the heat and dust in an immense throng of people, with no protection from the great heat of the sun, thereby subjecting him to and causing him great bodily pain, and greatly injuring his health, and causing him great mental anguish and suffering, to his great damage in the sum of \$2000.

Facts—Petition.

The defendant, answering, admits that at the time mentioned in the petition it operated a line of railroad through the territory of Oklahoma and through the territory known as the "Cherokee Strip"; that the north line of Logan county borders on the south line of said Cherokee Strip; that said Guthrie, the county seat of

Same—Answer.

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Logan county, is situated on the line of said defendant's road; that the said defendant had a station at Guthrie for the purpose of receiving and disembarking passengers from its trains; that said defendant owned a station at Orlando, as alleged in said petition; that said defendant owned and had a station at Wharton, in the Cherokee Strip, as alleged in said petition.

Defendant further admits that on the 16th day of September, 1893, by proclamation of the president of the United States, said Cherokee Strip was thrown open to settlement by the public, but avers: That on the 11th day of September, 1893, the honorable secretary of the interior duly made and promulgated the following order: "Department of the Interior, Washington, September 11th, 1893. Order. In view of the proclamation issued by the president of the United States, fixing twelve o'clock noon of September 16th, 1893, as the hour at which the Cherokee Outlet will be opened to settlement, and to the end that the rules and regulations heretofore prescribed for said opening may be the more effectually executed, I hereby direct that no railroad train be permitted to enter said outlet during the six hours before said time of opening. For three hours after said time of opening, trains will be allowed to enter said outlet only under the following regulations:

"(1) They must be for general use, and not leased or chartered to any favored passenger or passengers.

"(2) Trains must be stationed at the edge of said land at least thirty minutes before the hour of opening, and shall not be entered by passengers earlier than thirty minutes before the hour of opening.

"(3) No one shall enter either of said trains as a passenger unless he holds a certificate from one of the booths.

"(4) The trains may start upon said land any time after the hour of opening.

"(5) Trains must stop at every station, and at intermediate points not more than five miles apart.

"(6) The trains will be limited in speed to 15 miles an hour.

"(7) The regular local rates of passenger charges shall not be exceeded.

"(8) No one shall be allowed to board said trains after they enter the strip. United States officers in charge will give effect to this order. Hoke Smith, Secretary of the Interior."

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That such order was duly published in the territory of Oklahoma, and of which said order and the terms thereof said plaintiff was fully advised. That the Atchison, Topeka & Santa Fé Railroad Company ran its trains on said date into said Cherokee Strip in conformity with said order, of which the plaintiff and the general public had notice, and trains were not run on said date on the regular schedule of said company. Said defendant further avers that if the said plaintiff was ejected from the train of this defendant, as alleged in said complaint, he was so ejected by the officers and agents of the United States, and not by the servants or employes of the defendant.

The plaintiff replied, admitting that on the 16th day of September, 1893, the Cherokee Strip was opened for settlement, as set out in the answer, and that the proclamation of the honorable secretary of the interior was truly set out in said answer, and that the plaintiff had notice thereof. Plaintiff denied that he was ejected from the cars of the defendant by the officers of the United States government, or that he was ejected from said cars by virtue of or under color of said proclamation of the honorable secretary of the interior, but that he was unlawfully and violently ejected from said cars by the servants and employes of the defendant, as set out in the petition. Plaintiff denied that he in any manner disobeyed the directions and rules in said proclamation, or did anything therein prohibited.

Same—Repl-
cation.

On the 9th day of October, 1894, the case was tried by jury before Chief Justice Dale, presiding judge of the First judicial district. Plaintiff introduced his testimony, and a demurrer was interposed by the defendant. The court took the case from the jury, entered up a judgment for costs against the plaintiff and in favor of the defendant, and held the cause for dismissal. Thereupon the plaintiff filed his motion for a new trial, which was by the court overruled.

Parts—Con-
cluded.

The plaintiff brings error, and asks that the cause be reversed, assigning as error: First, the sustaining of the defendant's demurrer to plaintiff's evidence; second, discharging the jury and rendering judgment against the defendant for costs; third, overruling plaintiff's motion for a new trial.

The entire question will be considered together briefly, as a

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lengthy discussion is unnecessary. As we view it, the case turns largely upon the proposition as to the right of a railroad company to prescribe reasonable rules and regulations for the government and use of its property, and as to whether the rule prescribed by the defendant in error on this day,, in obedience to the order of the secretary of the interior, or in pursuance of an exigency by the company, on their own responsibility, as sufficient, was a reasonable rule.

Right of carrier to prescribe rules.

The evidence fails to sustain the allegations of the petition as to violence, and we think the case can be decided properly upon the question of the reasonableness of the rule established for the 16th day of September, 1893, without discussing the proposition as to whether the order made by the secretary of the interior was binding upon the company or not. It is sufficient upon this question to say that the order of the secretary was obeyed to the letter by the defendant in error, and it will certainly occur to an impartial mind that the company can stand upon its own rights under the law without seeking shelter behind the order of the secretary of the interior.

There is no doctrine of corporation law better settled than the right of a railroad corporation to prescribe reasonable rules and regulations for the government and use of its property. The only restriction under the law is that the rules must be reasonable. It is equally well settled that it is the duty of the purchaser of a ticket to inform himself of such rules and regulations, and upon doing so to conform to the customs of the road in transporting passengers. We take it that these propositions admit of no controversy.

Carrier may prescribe reasonable rules.

If it be true that a railroad corporation has this right under the law, why should it not be true also that on such an occasion as the opening of several million acres of land to settlement under a specific law of congress, and by special direction and supervision of the secretary of the interior, it should have the right to prescribe reasonable rules and regulations for carrying into effect the purpose of the law?

It was the duty of the company as a carrier of passengers to carry passengers, but only according to law. Congress had passed a law providing for the opening of the Cherokee Outlet. The president, under this law, proceeded to carry out its provisions. The secretary of the interior prescribed certain rules

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and regulations in order that the intention and purpose of the law might be better effected. The defendant in error did the same. The rule complained of by the plaintiff in error is that he was required to debark at the line. This rule was established by the defendant in error to give effect to the following clause of the order of the secretary of the interior: "That the trains must be stationed at the edge of said land thirty minutes before the hour of opening, and shall not be entered by passengers earlier than thirty minutes before the hour of opening." Reasonableness of rule in issue.

Whether bound to conform to this order or not, the railroad company regarded it as a reasonable rule to establish on a great occasion of this kind and put it in force, and, in order to give effect thereto, were compelled to eject the plaintiff in error from the train upon his refusal to debark. If the plaintiff in error was desiring to enter the lands to be opened to settlement, he cannot complain of the company obeying the order of the secretary of the interior, and, if not, and the rule is a reasonable one, he was bound to know that six hours before 12 o'clock noon of September 16, 1893, no passenger train would pass the north line of said territory; that on said 16th day of September, 1893, regular passenger trains were not scheduled as through trains at the hour said plaintiff in error sought for through passage.

Was this rule prescribed by the defendant in error on the 16th day of September, 1893, a reasonable rule? The opening of the Cherokee Outlet to settlement has gone down into history as a scene and an occasion unequalled by any similar event of modern times. A vast domain was opened to homestead settlement in a day, and more than 100,000 people waited upon the borders for the hour of noon, when they could break forth on a wild rush for either town lots or homestead lands. At the particular point where the trains of the defendant in error were located, thousands thronged to board the first train to enter, and, if possible, gain some advantage and get to the promised land before the awful rush.

Had trains gone into the country prior to 12 o'clock, hundreds would have become violators of the law, no doubt, and, had the defendant in error permitted those already aboard when the trains arrived at the line to remain in the coaches, those waiting on the line to enter trains according to the order

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of the secretary of the interior and the rules prescribed by the company would have been placed at a disadvantage and their rights under the law would have been unequal and prejudiced thereby.

Yes, this rule was a reasonable one, and, in addition to this, was adopted by defendant in error by order of the secretary of the interior; and for this court to hold, or the court below to have held, as a matter of law, that it was an unreasonable rule, would, we think, have been error.

The lower court did not err in sustaining the demurrer to the evidence, and ordering a dismissal of the case under the state of the pleadings and proof; and the *judgment rendered below will be affirmed*, with costs.

It is so ordered.

All the justices concurring.

DALE, C. J., having presided below, not sitting.

CONSOLIDATED TRACTION CO.

v.

TABORN.

(Supreme Court of New Jersey, June 17, 1895.)

Changing Method of Transfer Without Notice to Passengers.—If a street-railway company has established by its practise a right in its passengers to change without a transfer ticket from one car into another in the completion of their journey, it cannot change such practise without due notice. (*Page 125*)

What will Constitute a Wrongful Ejection [(1) p. 156].—If a passenger, having a right to remain in a car, is ordered by the conductor to leave it, and, the car being stopped, obeys such order, such conduct of the conductor is tortious, for which an action will lie. (*Page 126.*)

ERROR to Essex county circuit court.

A. Q. Keasby & Sons, for plaintiff in error.

Samuel Kalisch, for delendant in error.

BEASLEY, C. J.—This suit is grounded on an expulsion from the cars of the plaintiff in error.

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The gravamen of the case was thus constituted: The plaintiff took passage in one of the cars of the plaintiff in error, intending to go to the vicinity of Park street. She purchased and paid for a ticket that entitled her to go to that destination. At a certain point on its line the company was changing its tracks, so that the plaintiff could not complete her trip without changing cars. It appeared from the evidence that this condition of things had existed for some time, and that it had been the established practise of the road to permit the passengers to pass beyond the obstruction into a second car without any transfer ticket. In the belief that such regulation was still in force the plaintiff made the change. After she had gone a short distance the conductor of this second car demanded her fare, and on her refusal to pay, and having no transfer ticket, the car was stopped, and she was ordered to leave it. This order she obeyed, and this expulsion is the ground of action.

Case stated.

It was also in proof that, on the day in question, or the day preceding it, the regulations of the company had been changed, so that passengers being transferred at this point were to be given transfer tickets showing their right to a seat in the car to which they were transferred. The plaintiff had no knowledge of this alteration in the methods of the company,

Upon this subject the circuit judge, in the course of his accurate and lucid charge to the jury, thus propounded the rule of law pertinent to it: After stating that the company had the right to establish reasonable regulations for the conduct of its business, the instructions to the jury proceeded in these words:

Change of
method of
transfer with-
out notice.

“ Now, in order to make a rule reasonable, if it is to affect the public, the public must have reasonable notice of it, and where a railroad company, or any other common carrier, adopts or uses for any given time a given system, and then chooses to change that, they must give, in order to make the rule a reasonable one, reasonable notice. So that I charge you that on this day in question, if the other system had been in force immediately previous to that time, not requiring any transfer tickets, and on the 8th day of May (the day in question) a transfer ticket was required by the rules and regulations of this company, then the traveling public had the right to have reasonable notice given to them to that effect. That notice could have been given them by the conductor of the car, or by a

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transfer agent; but that it should have been given, and must have been given in some manner, in order to make the rule a reasonable one, is beyond question."

That this judicial direction was legally correct in all respects seems to be indubitable. The exception taken to it on the part of the defense is devoid of all substance.

Neither, with respect to the second objection, touching the form of the action, do we find any difficulty. That objection

What constitutes an objection.

is that the procedure should have been in the form of an action of *assumpsit*, and not, as it is, *in tort*. The *rationale* of the exception was that, if the defendant was at fault, as insisted on, such fault amounted simply to a breach of its contract to carry the passenger to her destination. But it is obvious that there was, in the transaction proved, an element of misconduct that does not belong to the nonperformance. It clearly presents a case, not merely, on the part of the company, of nonfeasance, but of malfeasance.

The plaintiff, by force of her contract, was in the lawful possession of a seat in the car in question, and she plainly was compelled to give up that right by the unlawful act of the servant of the defendant. The car was stopped by the conductor, and the passenger was ordered to leave it, and, under such circumstances, to construe her submission into a consent, and the surrender of her seat into a voluntary act, would be absurd. The conduct of the conductor, who was clothed with full authority on the occasion, was an unmistakable threat that, unless his order was obeyed, the plaintiff would be forcibly removed from the car, and consequently, when the passenger left the car, it was but yielding to a force little short of duress. In the opinion of the court the act of the conductor, on the occasion referred to, was tortious, and the action is properly grounded.

The other objections have been examined, and are overruled.

Let the judgment be affirmed.

Dave v. Morgan's L. & T. R. & S. Co. Ejection of Passengers

DAVE (Philip)

v.

MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP CO.

(47 *La. Ann.* 576.)

Expulsion of Passenger—[(1) p. 156]—**Carrying beyond Destination**—[(1) p. 184]—**Liability of Company**.—The passenger on the railroad train is entitled to be carried to his destination; if carried beyond and made to leave the train, under the compulsion of the orders of the train officials, he is entitled to damages. (*Page 127.*)

APPEAL from Lafourche parish—*Affirmed.*

Clay, Knobloch & Son, Leovy & Blair, and Victor Leovy, for appellant.

Beattie & Beattie, for appellee.

MILLER, J.—The plaintiff, a passenger on defendant's railroad, sues for damages, alleging he was forcibly ejected from defendant's train, at a point not his destination, but some distance beyond, thus imposing on him the necessity of walking on a rainy night, as he alleges, for a mile or more. Case stated.

The defendant concedes the train passed the plaintiff's station, going a short distance further, due to the darkness of the night, but denies the alleged expulsion of the plaintiff from the train.

The judgment of the lower court was in plaintiff's favor for \$50, from which the defendant appeals.

The previous decision in this court maintained this suit, brought in the parish of Lafourche against the defendant, domiciled in New Orleans, on the theory that the expulsion of plaintiff from the train was a trespass, and gave plaintiff the right to sue in Lafourche, where the wrong was done. See defendant's charter, § 12. *Payne v. Steamship Co.*, 43 *La Ann.* 981; *Dave v. Steamship Co.*, 46 *La. Ann.* 273.

The proof is that the train was stopped a short distance beyond plaintiff's destination. The stoppage of the train and

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the announcement of the station may be accepted as a direction to leave. There is testimony that it was enforced by emphatic language by the porter and conductor. On this point the evidence is conflicting.

The district judge reached the conclusion the plaintiff left the train under the compulsion of a peremptory order from the train officials, and in this sense the compulsion must be accepted as established.

The question, then, in this case, is the damages the defendant must pay for putting the plaintiff off beyond his station.

The distance from the station is the subject of some variance in the testimony, but we conclude 800 feet would be a reasonable estimate, based on all the testimony. The night was rainy. The plaintiff intended a visit to a neighboring plantation, and if put out at his station he would have encountered the rain on his contemplated visit. His action for damages is not to be depreciated because he is a field hand, but the circumstance naturally suggests that exposure to the rain as an element of his discomfort was not to him a novel experience. He complains, too, of the harsh expressions of the conductor and porter, denied by them in their testimony. There is, of course, in this case, no proof of actual damage.

We have given attention to the argument that if plaintiff is entitled to any amount he should recover counsel fees. If this is recognized in many cases, the recovery would be greater than any amount given if fees were not included. We do not think the compensation to counsel should be admitted as part of the damages. The judgment of the lower court we are asked by plaintiff to increase, and by defendant to reduce.

We think the verdict has done justice to the parties.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be *affirmed*, with costs.

SHEETS (Lee)

v.

OHIO RIVER R. CO.

(*Supreme Court of Appeals of West Virginia, Nov. 17, 1894.*)

Ejection of Passenger [(1) p. 156]—Failure to Inform Conductor of Change in Rules and Regulations—Liability of Company.—Where the proper official of a railroad company fails to inform a conductor of a change in its rules and regulations as to the sale of tickets and the stoppage of its trains, and such conductor, acting through want of the necessary information, wrongfully refuses to carry a passenger to his destination, and ejects him from the train, the company is liable to such passenger, in an action on the case, for the damages sustained by reason of the wrong committed. (*Page 131.*)

ERROR to Ohio county circuit court. Affirmed.

Leonard & Archer and *J. B. Sommerville*, for plaintiff in error.

Ewing, Melvin & Ewing and *J. C. Palmer*, for defendant in error.

DENT, J.—This is an action of case, instituted by Lee Sheets against the Ohio River Railroad Company, in the circuit court of Ohio county, in which there were a verdict and judgment for the plaintiff on the 12th day of October, 1892, for the sum of \$400, with interest and costs. Case stated.

The defendant claims that the circuit court erred—First, in overruling the defendant's demurrer to plaintiff's declaration and each count thereof; second, in overruling defendant's objections to the evidence of plaintiff as set out in bill of exceptions No. 1; third, in overruling the defendant's objections to plaintiff's testimony as set out in bill of exceptions No. 2; fourth, in overruling defendant's motion to exclude plaintiff's evidence as set out in bill of exceptions No. 3; fifth, in overruling defendant's motion to set aside the verdict rendered by the jury in said cause (see bill of exceptions No. 5); sixth, in refusing to give Errors assigned.

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the instructions asked for by defendant as set out in bill of exceptions No. 6.

The case, as to all the objections raised, to wit, as to the declaration, the admission of testimony, form of action, instructions given, and amount of damages, is exactly in point with, and fully controlled and settled by the case of *Boster v. Railway Co.*, 36 W. Va. 318.

The only real contention herein not settled by that case is because of the refusal of the circuit court to give the following instruction, to wit: "The jury are instructed that, even if they believe from the evidence that the ticket agent at Salama was authorized by the superintendent of the defendant to sell round-trip tickets from Salama to St. Mary's for defendant's train No. 3, still they cannot find for plaintiff on that account, unless they further believe from the evidence that Conductor Hinde was informed of such authority."

The facts are as follows, to wit: The plaintiff purchased at Salama, a station of the defendant, of its agent, a round-trip ticket to St. Mary's, another station of the defendant north of Salama, which he was informed was good for passage and return on all the defendant's passenger trains. He made the upward trip, and boarded the defendant's passenger train No. 3 to return. When he offered his return ticket to the conductor, he was informed that it was not good for passage on that train, as it did not stop at Salama, unless he had passengers either from or north of another station, called "Sardis," being a station further north than St. Mary's, and that he had no such passengers on the train, and would not therefore stop at Salama, but that the plaintiff would have to leave the train at the next station, called "Belmont," about five miles short of his destination. The plaintiff was anxious to get home, owing to the dangerous illness of his daughter, and insisted on the conductor receiving his ticket. But the conductor compelled him to leave the train at Belmont. The plaintiff was a very large man, and badly crippled, and, through his anxiety to reach home, walked all the way from Belmont to Salama. The train No. 3 did stop that day at Salama; the conductor supposes because it was flagged.

The uncontradicted testimony of the agent at Salama establishes the fact that he was authorized by the superintendent of the defendant to sell round-trip tickets to St. Mary's

Sheets v. Ohio River R. Co. Ejection of Passengers

good for passage either way on train No. 3, but the excuse of the defendant is that the conductor had not yet been informed of this instruction or regulation, and he, acting under his abrogated or modified instructions, was justified in his course, and the defendant thereby relieved from liability in this action.

In the case of *MacKay v. Railway Co.*, 34 W. Va. 65, 44 Am. & Eng. R. Cas. 395, the conductor was in the right, and the passenger in the wrong. In this case the passenger is in the right, and the conductor, acting through want of instruction, is in the wrong. The plaintiff had his ticket, and under the common law (section 9, art. 11, of the constitution of this state), and according to the then existing regulations of the defendant, had the right to transportation to the place of his destination. This he was wrongfully refused.

Ignorance of the company's instructions may be a good excuse for the conductor to give the company for his conduct on this occasion, but it does not relieve the company from liability to the passenger who has been wrongfully treated. The law will not permit a railroad company to have conflicting rules or regulations governing its different officers and agents, and, for this reason, grant it immunity from liability for the wrongful treatment of its passengers. The agent made no mistake in selling the ticket, but he acted strictly in accordance with the instructions of the defendant; but the conductor made the mistake and committed the wrong. Neither the passenger nor the conductor is to blame, but the responsibility falls upon the defendant alone, who must suffer the consequences. The plaintiff, having been wrongfully treated, in the language of Judge HOLT in the case of *Boster v. Railway Co.*, *supra*, is entitled to receive "a reasonable and fair compensation for his physical discomfort and inconvenience, his mental suffering and pain, the insult and humiliation, all following as the direct proximate result of having been driven from the train wrongtully."

"We cannot say that the damages found are so excessive as to warrant the belief that the jury must have been influenced by some mistake, partiality, prejudice, or passion;" and therefore the judgment is affirmed.

Liability of
company—
Failure to in-
form conduc-
tor of change
in rules, etc.

Ejection of Passengers

L. & N. R. Co. v. Ellis

LOUISVILLE & NASHVILLE R. CO.

v.

ELLIS' (Stephen W.) ADMINISTRATRIX.

(Court of Appeals of Kentucky, April 25, 1895.)

Expulsion of Passenger—Liability of Company for Death of Intoxicated Passenger after Expulsion from Train [(3) p. 159].—If train officials who are aware that a passenger is so intoxicated as to be unable to care for himself, eject him from a train at a place and under such circumstances as to expose him to danger from passing trains, the company will be liable, if while in such helpless condition and shortly after his expulsion, he is killed by another train on the same road. (*Page 138.*)

Same—Necessity of Proof of Knowledge by Company's Servants of Probable Result of Expulsion.—If it is proved that the train officials knew of the helpless condition of the person killed at the time of the ejection, it is not essential to a recovery that proof should be given that such officials knew the results which would necessarily or probably flow from their act of expulsion. (*Page 139.*)

Admissibility in Evidence of Declarations by Conductor.—A statement or declaration of a railroad conductor cannot bind the company unless made under such circumstances as to make it a part of the *res gestæ*. (*Page 139.*)

APPEAL from Shelby county circuit court. *Reversed.*

J. C. Beckham & Son, for appellant.

P. J. Foree, L. C. Willis, and J. A. Scott, for appellee.

PAYNTER, J.—The administratrix of Stephen W. Ellis, deceased, brought this action against the Louisville & Nashville Railroad Company to recover damages, alleging
Case stated. that the decedent was a passenger on a train of the appellant, on his way from Lexington, Ky., to Cropper; that the officers and agents of the appellant in charge of the train unlawfully, wrongfully, wilfully, and negligently ejected the decedent from the train while he was physically and mentally incapable of taking care of himself, and placed him in an exposed and dangerous position, where he was shortly afterwards run over and killed by another train in charge of appellant's agents on the same line of railroad; that the deceased was lying unconscious on the track when so killed. The killing took place on the 2d day of September, 1892.

The trial resulted in a verdict and judgment for appellee in the sum of \$11,000.

The undisputed facts are that, on the morning of the day Ellis was killed, he obtained a round-trip ticket on the appellant's road from Cropper to Lexington, and that he got aboard of the train from which he was ejected, which left Lexington, going in the direction of Cropper. Facts.

On the trial of the case much testimony was offered by both sides, some of which was of a very contradictory character. The appellee introduced a number of witnesses whose testimony tended to prove the following state of facts: That the deceased was in Lexington on the day he was killed, and had been drinking very heavily; that he was about the depot the evening before the train started, in a very intoxicated condition; that a friend who was with him endeavored to keep him from getting on the train from which he was ejected, telling him it was not the train upon which they should return, and, notwithstanding the effort to prevent him, the deceased got aboard the train, and left Lexington on it. One witness, speaking of the deceased's condition just before he left Lexington, said: "He was very drunk. He seemed to be almost in a lifeless condition. He could walk about, but seemed to be not sensible at all." Another witness said: "I could see he was very drunk. They had hold of him, holding him up." Woodford Hughes was on the train from which Ellis was ejected, and, in speaking of his condition, said, "He was very drunk, staggering around, uttering curses sometimes, and getting up, falling around,—first against one man, and then against another." Other witnesses testified as to his drunken condition, but to whose testimony it is unnecessary to invite special attention. Vileys station is a short distance from Lexington. Witnesses testified that the deceased was not put off at that station, but that he was carried 400 or 500 yards beyond the station, and put off in a cut; that there was a ditch along the track. And the testimony tended to prove that there were considerable banks on either side of the track where he was put off, fences on either side, and no outlet at that point from the track. The testimony introduced by appellee conduced to prove that deceased was very drunk when put off, and was left standing near the track, stooped over, and acting in a way which indicated that he did

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not know what to do. It is in evidence that one passenger appealed to the conductor not to put deceased off in "that condition, but take him to a station."

There was proof that the Chesapeake & Ohio express train, which uses the road of the appellant, was to soon follow the train upon which the deceased had taken passage. The testimony in the record shows that the train from which deceased was ejected left Lexington at 6:03 p.m. The express train just mentioned was due to leave Lexington at 6:35 o'clock, but left six or seven minutes late. The appellant introduced a number of witnesses tending to prove that the deceased was put off the train at Vileys station, on the opposite side of the road from the station; that the deceased was able to and did walk off the train himself; that he was not so drunk as to be incapable of taking care of himself. It introduced testimony tending to prove that the first blood was seen on the track at a point 2,920 feet from Vileys, in a cut, from which appearance it is argued that that is the point where the train struck the deceased.

It is claimed for the appellee that the deceased, when ejected from the train, was physically and mentally incapable of taking care of himself, and that he was put off in a cut some distance from a station,—an unsafe place; that the officer and agents knew his condition when they ejected him; that the deceased was quiet, and not disturbing the passengers, and that a passenger offered to pay his fare before he was put off; that the deceased was killed by a train which followed in a few minutes the one from which deceased was ejected, and that the officers and agents of appellant knew this fact when they ejected the deceased; that deceased was killed by this train.

For the appellant it is claimed that the deceased was put off at one of its stations for his failure to produce a ticket or pay his fare on the demand of the conductor; that the deceased was not so drunk as to be physically or mentally incapable of taking care of himself; that when he was ejected he was placed at a reasonably safe distance from passing trains; and that the appellant is not liable in damages for killing the deceased, as it is not responsible for deceased's coming on the track, and the proof showing that the officer and agents in charge of the train that killed Ellis did not prevent, and could not have prevented, the killing by the exer-

cise of reasonable care after discovering him on the track. There is no evidence in the record tending to show that the officers or agents in charge of the train which is believed to have killed Ellis were guilty of any negligence whatever. If appellee is entitled to recover, from the facts developed in this record, it must be on account of the conduct of the officers or agents of the train from which deceased was ejected.

A number of instructions were offered by counsel for appellant and appellee, all of which were refused by the court.

The court then gave the jury three instructions, the effect of which was that the jury could not find for the appellee unless the jury believed from the evidence that, at the time deceased was ejected from the train, he Instructions. was in such a state of intoxication as to render him mentally or physically incapable of taking care of himself, and in such helpless condition that, to put him off the train at the time and under the circumstances and in the place where he was ejected, would necessarily expose him to danger of death or great bodily harm from passing trains, and that appellants' agents in charge of the train at that time knew of the helpless condition of the deceased, and the danger to which he would be exposed by being then and there ejected from the train, and that they at that time, and under the circumstance and in the place where he was ejected, and with the knowledge of such helpless condition, forcibly, wilfully, and negligently ejected him from the train, and that he was shortly thereafter, while so mentally and physically unable to take care of himself, and in such helpless condition, run over and killed by another train in charge of appellant's officer or agents.

The instructions given by the court recognize the right by appellant to eject deceased, when he failed to produce a ticket or to pay his fare, unless some one else offered to pay and tendered his fare, and which offer was refused by the conductor.

By instruction No. 3 which the court gave the jury, the recovery was confined to compensatory damages.

Instruction No. 1 offered by counsel for appellant told the jury, in substance, that, if the decedent failed to produce his ticket or pay his fare, the conductor or other agent or servant of the appellant had the right to eject him, using no more force than was necessary for the purpose, and if the decedent was placed so far from the track that he was then out of danger of passing trains, and that he afterwards went upon the

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track, and was killed by another of appellant's trains, the jury should find for the appellant, unless they further believed that the appellant's officers and agents in charge of the train that killed decedent discovered his peril, and could have prevented the killing, by the exercise of reasonable care, after discovering him on the track.

It is insisted that this instruction should have been given to the jury.

This contention brings us to the consideration of the question as to the right of the appellant's officers or agents in charge of a train to eject one (who is not imperilling the safety of the passengers) who has forfeited his right to ride upon the train, regardless of the time, place, circumstances, and his physical and mental condition. Under this instruction the jury could not find against the appellant if they believe that the decedent was placed so far from the track that he was then out of danger of passing trains, and he afterwards went upon appellant's track, and was killed by another train, unless they believed that the officers and agents in charge of such train discovered his peril, and could have prevented the killing, by the exercise of reasonable care, after discovering him on the track. This instruction assumes that the agents of appellant had the right to eject decedent, regardless of the time, place, circumstances, and his physical and mental condition. This certainly is not the law in this state.

It seems to us that the ordinary principles which characterize humanity condemn such claim. If the claim of appellee be true,—that the decedent was ejected in a cut, away from any station, with banks and fences on either side of the track, in such mental or physical condition as rendered him incapable of taking care of himself (the officer with a knowledge of his condition),—then it was no less wrong to eject decedent under such circumstances than it would have been to have ejected from a train a toddling child, who had not mental capacity to know the danger of walking upon a railroad track, or the physical ability to avoid such danger, if it had the mental capacity to discover it. Would any one contend that if it should kill a child under such circumstances the appellant would not be liable in damages therefor? The fact that the deceased, by his own act, became intoxicated to the extent which rendered him incapable of taking care of himself, does not release the appellant from liability for the acts of its officers and servants in ejecting him.

The intoxication of the decedent is the remote, but may not be the proximate cause of the killing.

While the facts of this case differ somewhat from those of the case of *Railroad Co. v. Sullivan*, 81 Ky. 624, yet the principles enunciated in that case are applicable to this one. Sullivan was ejected from a train, in freezing weather, while in a helpless condition, resulting from intoxication; and, as a result, his feet, hands, and other parts of his body were frozen, causing suffering and amputation of his toes, etc. The court in the Sullivan case said: "But about one hour and a half afterwards [expulsion], near the time for the train going towards Christiansburgh to pass, and about two hundred and fifty yards toward Cropper from the place where the conductor testifies he was put off the train, he was discovered by one of the witnesses lying across the track, helpless and really unconscious, with a quart bottle nearly full of whisky, who pulled him off the track, but, being unable to remove him from the place, left him." Suppose the train which was soon to pass, going to Christiansburgh, without any negligence of those in charge of it, should have run over and killed Sullivan, and the action being for the damages resulting from the killing, can any one doubt that the court, in that case, would have held that the railroad company was liable? The killing would have been as proximately the result of the wrongful act of expulsion as was the injury by freezing.

Cases considered.

In the case of *Railroad Co. v. Logan*, 88 Ky. 241, the court said: "There might be a case where a railroad company would be guilty of wilful neglect, in the meaning of the statute, by ejecting, without imperative necessity, a passenger so drunk as to be helpless, when his death would naturally and probably result from agencies other than his own act, then present and impending." In the Logan Case, *supra*, the court very properly held that the railroad company was not liable for the killing, as deceased's remaining on the train imperilled the safety of the passengers. Besides, his condition was not such as indicated to the officers and agents in charge of the train that he was incapable of taking care of himself.

Gill v. Railroad Co., 37 Hun. 107, was an action to recover damages ensuing from the death of the plaintiff's intestate, Arthur O. Gill, alleged to have been caused by the negligence of defendant in ejecting him from its train. The de-

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ceased was a passenger on the defendant's train that left Le Roy, running westwardly, at half past seven in the evening of Saturday, 24th of February, 1883. For failing to produce a ticket or pay fare, the train was stopped, and he was put off at a point something over a mile distant from the Le Roy station, and 115 rods from the nearest accessible dwelling house. The night was dark, cold, and stormy. As the train moved away, the deceased was seen standing or leaning against the bank of the cut. No witness spoke positively of having seen him after that until the following Monday morning, when his dead body was found on the opposite side of the track from which he was put off, lying in partially frozen mud and water. The immediate cause of his death was suffocation or drowning. To establish the liability of the defendant, two theories were presented by the plaintiff: First, that the deceased was put off with unnecessary violence, and was so stunned or paralyzed thereby as to be incapable of taking care of himself; and, secondly, that he was so intoxicated as to be incapable of caring for himself, to the knowledge of the conductor when he was put off the train. Testimony was introduced tending to sustain the contention of plaintiff. The court said: "Upon either theory presented to the jury, whether the deceased was incapacitated from caring for himself by intoxication, or by a paralyzing stun, if he was in fact so incapacitated, and so continued until he perished, we think his ejection from the cars, under the circumstances, must be regarded as the proximate cause of his death. By reason of his incapacity, no voluntary and conscious act of his own could intervene between the original cause and the final result; and the case is the same, in legal effect, as if, when ejected from the car, he had been thrown into a pool of water, and instantly drowned." *Conolly v. Railroad Co.*, 41 La. Ann. 57, 37 Am. & Eng. R. Cas. 117; *Haley v. Railway Co.*, 21 Iowa, 15; *Railroad Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543, 21 Am. & Eng. R. Cas. 418.

We are of the opinion that if the deceased was ejected from the train when he was in such mental or physical condition from intoxication or other cause which rendered him incapable of caring for himself, and the officers or agents in charge of the train knew of his then helpless condition, and to put him off the train in such condition at that time, and under the circumstances and in the place where he was ejected, would necessarily of

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probably expose him to danger of death or great bodily harm from passing trains, and that while in such condition he was, shortly after his expulsion run over and killed by a train on the road of appellant, the appellant is liable for the damages resulting for killing him. It follows from this view of the case that the court did not err in refusing the instructions offered by counsel for appellant, nor did the court err to its prejudice in instructing the jury. They are more favorable to the appellant than it was entitled to, in using alone the words "necessarily exposed," etc. It should have said "necessarily or probably," etc.

In referring to the ejection of the deceased, language was used in the instructions as follows: "That defendant's agents in charge of said train at that time knew the then helpless condition of the deceased, and the danger to which he would be exposed by being then and there ejected from said train." So much of these instructions as required the jury to believe from the evidence that the agents in charge of the train knew of the deceased's helpless condition when they ejected him is correct. But, in so far as it required appellee to prove that such agents knew the results which would necessarily or probably flow from their act of expulsion, it is incorrect.

Necessity of
proof of
knowledge by
servants of
company.

If the helpless condition of the deceased at the time of his expulsion is shown, and that the agents in charge of the train knew of it when they so expelled him, the conclusive presumption follows that they knew the consequence which would follow such acts; otherwise it would be a most difficult task to hold a party liable for a tort. It would in many cases be impossible to prove that the party who was charged with the wrongful act knew what would result from it. And, from the criticism we have made upon the instructions given by the court, we think they state substantially the law of the case.

There was an error committed, to the prejudice of the appellant, which makes necessary a reversal of the case. Woodford Hughes was introduced as a witness for the appellee, and over the objection of counsel for appellant, gave testimony as follows: "By Counsel for Appellee: I will ask you if any member of that train was present when you talked with the policeman at Frankfort. Answer. The conductor was there. Question. Fitzgerald? Answer. Yes, sir. Question. Tell what was said. (Question

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of declarations
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objected to by defendant. Objection sustained.) Question. I will ask you if, when you got to Frankfort, you got any announcement that a man had been killed back up the road. Answer. Yes, sir. Question. How did you get the news? Don't tell what was said, but tell the manner of getting it. Was it a telegram, do you know? Answer. I don't know how—whether there was a telegram or not—but I heard them say there was a man killed. Question. I will ask you whether at that time you heard the conductor make any statement as to who he thought it was? (Question objected to by defendant. Objection overruled, to which defendant, by counsel, excepted.) Answer. He said he expected it was the man he put off the train."

This testimony is incompetent. It was no part of the *res gestæ*. The conductor of the train is the agent of the appellant for the purpose of operating the train. No statement or declaration of his can bind the appellant, except it was made under such circumstances as to make it a part of the *res gestæ*.

The court, in the case of *McLeod v. Ginther*, 80 Ky. 399, 8 Am. & Eng. R. Cas. 162, rehearing 15 Am. & Eng. R. Cas. 291, held the statements of the conductor were admissible, as part of the *res gestæ*, which were made in a few seconds after the accident which resulted in the death of Ginther, and in view of the wrecked train, and amid the search for persons whose fate was then unknown. The court, in *McLeod v. Ginther*, *supra*, said: "The general rule is that all declarations made at the same time the main fact under consideration takes place, and which are so connected with it as to illustrate its character, are admissible as original evidence, being what is termed a part of the *res gestæ*—in other words, a part of the thing done." The declaration in question was not made at the time of the expulsion, nor at the time of the killing, but a considerable time afterwards. The declaration of the conductor, as proven by Hughes, was introduced as original evidence. Doubtless the jury regarded it as tending to contradict the testimony of the conductor when he says he put deceased off the train at Vileys, and also when he says that the deceased was not in the helpless condition as claimed by appellee. The jury may have regarded it as an acknowledgment of the conductor that he knew the deceased was in a helpless condition when ejected. The court can see how counsel for appellee could have used it in argument effectively. It may have

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weighed heavily with the jury in reaching its conclusion as to the condition of the deceased when expelled, and as to the knowledge of the conductor as to such condition. It is fair to conclude that the jury was in no small degree influenced by the testimony in making up their verdict, as they would naturally reason that the conductor would not have "expected" the man he put off the train to be killed if he had put him off at a station, and in a condition wherein he was capable of taking care of himself.

The statement of the conductor, not being part of the *res gestæ*, was incompetent evidence, and it was an error of the court in allowing it to be proven, wherefore the judgment is reversed, with directions that a new trial be granted appellant, and for further proceedings consistent with this opinion.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS R. CO.

v.

RUSS (Charles A.).

(*United States Circuit Court of Appeals, Seventh Circuit, May 11, 1895.*)

Action for Wrongful Ejection of Passenger [(1) p. 156].—**Refusal of Immaterial Instructions—Extent of Injury.**—Where the extent of an injury sustained by a passenger wrongfully ejected from a train by the conductor thereof in nowise depends upon the intention or good faith of the conductor, there is no error in refusing to instruct the jury as to the right of the company to issue tickets with conditions attached, similar to that held by the passenger, or to issue reasonable instructions to conductors in respect thereto. (*Page 143.*)

Same—Resistance to Expulsion—Damages [(4) p. 161] —A passenger wrongfully ejected from a train may recover for increased injuries sustained by him because of sufficient resistance on his part to denote that he is being removed against his will. Per WOODS, Cir. J., and JENKINS, Cir. J. (*Page 143*)

Same—Same—Same—Extent of Resistance Permissible.—If there is no right to eject a passenger, he may resist the ejection with all needful force, and the company will be liable for the trespass and all the consequences thereof, whether he succeed in remaining on the train or be put off. *Distinguishing Railroad Co. v. Winter's Admir.*, 143 U. S. 73, 52 Am. & Eng. R. Cas. 328. Per SHOWALTER, Cir. J. (*Page 144.*)

ERROR to United States circuit court, district of Indiana.
Affirmed.

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The plaintiff was a passenger on one of defendant's trains from Louisville, Ky., bound to Indianapolis. He tendered to the conductor a mileage ticket, which, by the conditions annexed to it, was not transferable, and required the passenger presenting it to sign his name upon the ticket, in the presence of the conductor, in order to identify himself. The company has issued instructions to its conductors requiring them to enforce these conditions strictly, without fear or favor. The conductor required the plaintiff to sign his ticket, which he did; but the conductor, in the erroneous belief that the plaintiff was not really the owner of the ticket, took it up, and required the plaintiff to pay fare. Upon his refusal to do so, he was forcibly put off the train at Jeffersonville, Ind.

The plaintiff claimed that the force used in overcoming his resistance to expulsion brought on a nervous disorder, from which he had previously been suffering.

Samuel O. Pickens, for plaintiff in error.

Albert J. Beveridge, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge.—This action was for the wrongful removal of the appellee from a passenger train of the appellant. The case is here the second time, and for a fuller statement of it reference is made to the opinion reported in 57 Fed. 822, 18 U. S. App. 279.

The first recovery, which was for \$1000, was reversed because the jury was instructed that punitive damages might be allowed if the injury was wanton.

The judgment against which relief is now sought is for \$2500, and the errors assigned again relate to instructions given and refused, and it is stated in the brief of appellant that the only error relied upon is the refusal of the court to give the instructions asked.

There are two of them. The first is to the effect that railroad companies have the right to issue nontransferable mileage tickets with reasonable conditions attached, like those attached to the ticket sold by the appellant to the appellee, and in regard thereto to issue reasonable instructions to conductors, like those shown to have been issued by the appellant to its conductors.

Case stated.

Additional statement.

Errors assigned.

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All evidence in respect to the ticket and its conditions, and in respect to the rules and regulations of the company on the subject, was introduced on behalf of the appellant, and the argument in support of the proposed instruction is that: "If the conditions attached to the ticket, and the instructions of the company under which the conductor was acting, were reasonable, and such as the company might lawfully make and enforce, and the conductor was acting thereunder in good faith, with no purpose to oppress or wrong the passenger, the defendant in error was not entitled to damage for any increased humiliation and shame and consequent mental suffering resulting from the determined action of the conductor in obedience to said conditions and instructions."

The proposition is too remote and intangible to be availing. There is nothing in the conditions of the ticket, or in the regulations of the company in respect to tickets of that class, which a fair-minded juror, though unaided by an instruction, could have regarded as unreasonable, or as affecting the amount of damages which were to be awarded, as the charge of the court required, on the basis of compensation for the injury actually suffered by the appellee, including the humiliation and consequent mental suffering caused by the action of the conductor. The extent of that injury—punitive damages being excluded—in no manner depended upon the intentions or good faith of the conductor. It was material to consider only what was done by the conductor, and the consequent injury to the appellee.

Extent of
injury.

By the second request the court was asked to charge that if the plaintiff resisted the conductor's efforts to eject him, so as to require the use of force, and such resistance aggravated or increased the nervous trouble under which the plaintiff claimed to have been suffering, the resistance and resultant increase of suffering should be considered in mitigation of damages.

Resistance to
expulsion—
Damages.

Our views upon the question of the right of a passenger upon a railroad train to resist wrongful expulsion are indicated by our former opinion in this case. The rule declared by the supreme court in *Railroad Co. v. Winter*, 143 U. S. 60, 73, 52 Am. & Eng. R. Cas. 328, is that one rightfully on a train as a passenger has the right to refuse to be ejected, and to make a sufficient resistance to denote that he is being removed against his will. There was, therefore, no error in refusing

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the instruction in question. If it had been limited to injury caused by a voluntary or intended excess of resistance over what was necessary to show the unwillingness of the appellee to be expelled from the train, it ought perhaps to have been given; but to the extent of rightful resistance, if increased injury resulted, the right to increased compensation necessarily followed.

SHOWALTER, Circuit Judge (concurring).—If the passenger be ordered to leave the train, his getting off is *prima facie* caused by the order. He need not resist “to denote” that his leaving is “against his will.” If, however, the company have no right to eject him, he may repel the assault with all needed force, and the company will be liable for the trespass and all the consequences thereof, whether he succeeded in remaining on the train or be put off. On the other hand, if the passenger be, like a ticketholder in a theater, a licensee, then he must leave the train when ordered. By refusing, he becomes himself a trespasser, and may be put off. On either theory, the company would be liable for refusal to carry him, and this liability might involve consequences of aggravation. On the former theory, an action would also lie for the assault, but, of course, not on the latter.

The dictum in *Railroad Co. v. Winter*, 143 U. S. 73, 52 Am. & Eng. R. Cas. 328, that one “rightfully on the train as a passenger” has “the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he is being removed by compulsion and against his will,” implies that the public interest against a breach of the peace may be a limitation upon the rights of the injured party in trespass against the wrongdoer. Substantially this idea was the ground of decision in the overruled case of *Newton v. Harland*, 39 E. C. L. 952, in England, and in the cases, also overruled, of *Dustin v. Cowdry*, 23 Vt. 635, and *Reeder v. Purdy*, 41 Ill. 279, in America. The passenger cannot have the right to remain on the train while the carrier has the right to eject him. The latter cannot be saved from the consequences of the former’s resistance to an unlawful attempt to eject him. A right on the part of the carrier to persist in the assault cannot arise out of a resistance by the passenger greater than necessary “to denote” that he is “being removed

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by compulsion and against his will." The passenger's right to remain on the train secure from assault cannot be lost or impaired by such persistent resistance to a wrongful assault.

In Railroad Co. v. Winter's Adm'r the passenger was hurt as a consequence of a resistance obviously much more than sufficient "to denote" that he was "being removed against his will," but the carrier was held for such hurt. As stated in the report, "there was no question in the case respecting the measure of damages." The dictum above quoted was aside from the case.

Railroad Co.
v. Winter dis-
tinguished.

I agree that we must affirm. But, since we hold that the order to leave the train does not make the passenger who disobeys a trespasser, our judgment must necessarily mean that the defendant is liable for the consequences of whatever resistance the passenger wrongfully assaulted and expelled saw fit to make.

The judgment of the circuit court is *affirmed*.

GILLAN (Frank)

v.

MINNEAPOLIS, ST. PAUL & SAULTE STE. MARIE RAIL-
WAY CO.

(*Supreme Court of Wisconsin, December 17, 1895.*)

Ejection of Passengers [(1) p. 156]—**Ejection at Place Other than Station—Excessive Damages** [(4) p. 161].—Where a passenger is wrongfully ejected from a train on a rainy day, more than a mile from any house, and several miles from a station, a judgment therefor for \$750 is excessive, there being no grounds for substantial damages shown other than mental and physical suffering, and no facts entitling the passenger to exemplary damages. (*Page 147.*)

APPEAL from Oneida county circuit court. *Reversed conditionally.*

The action is brought to recover damages for the alleged wrongful ejectment of plaintiff decedent from defendant's train. Frank Gillan, on July 11, 1893, boarded one of defendant's accommodation trains, at Cavour. He paid the regular fare from Cavour to Pembine

Facts.

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to the conductor on the train. The conductor gave him no ticket or other evidence that he had paid his fare. At the station at Armstrong Creek, and before reaching Pembine, the train upon which Gillan was was delayed, and put upon a sidetrack. Afterwards another mixed train, going towards plaintiff's destination, came along, and took the car in which he was, and proceeded on its way.

The conductor of this train demanded of Gillan a ticket or his fare. For his failure to produce either, the train was stopped, and Gillan, at the conductor's command, went off. The place was more than a mile from any house, and between three and four miles from Armstrong Creek station. The day was rainy. Through a drenching storm Gillan returned to the station. The same night he was carried to Pembine, by the same train and conductor with whom he had started in the morning, and without further payment of fare.

Gillan was subject to inflammatory rheumatism. He claims that his exposure to the storm and wetting brought on an attack of rheumatism; that he suffered from it a long time, and did no work; that he supposed that it was the wetting which caused the attack of rheumatism, but does not know. He was not sick, nor confined to his house, made no complaint, and had no medical attendance or advice. His neighbors and familiars noticed no difference in his appearance or conduct. There was no evidence to show loss of time from his business or employment; no expense of nursing or medical service.

There was no ground for substantial damages other than physical and mental suffering. It was not a case for exemplary damages. The charge of the trial court was to this effect. The jury assessed the plaintiff's damages at \$1500. As a condition against the granting of a new trial on the ground that the damages were excessive, the plaintiff remitted \$750 from the verdict, and had judgment for \$750, from which the defendant appeals. Since the appeal was taken, Gillan has died, and his administratrix has been substituted as respondent herein.

Alfred H. Bright, for appellant.

Alban & Barnes, for respondent.

NEWMAN, J.—It does not appear that any substantial error occurred in the progress of the trial. There was little

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to be considered by the jury besides the assessment of the plaintiff's damages. It was not a case for exemplary damages, but for compensatory damages only. So the trial court advised the jury. Yet the jury assessed the damages at a sum so evidently and largely disproportionate to the injury actually sustained that the trial judge promptly required one half to be remitted, as the condition upon which the verdict should be permitted to stand. The judge might well have set aside the verdict altogether, for the large proportion of the verdict which he required to be remitted sufficiently indicates that he entertained the opinion that the verdict was so large as to make it manifest that it was the product of prejudice, partiality, or other improper bias.

Measure of
damage for
ejection from
train.

The parties are entitled to have even an assessment of damages made by a fair and impartial jury, and to have the impartial judgment of the jury in that behalf. But the trial court has a large discretion in such cases, whether it will allow a part to be remitted, and the verdict to stand for the balance, or whether it will set the verdict aside altogether, and grant a new trial. *Corcoran v. Harran*, 55 Wis. 120.

But it appears to this court that, after one half has been remitted from the verdict, it is evidently still too large for fair compensation; for there is really no evidence of time lost from business or occupation, or of expenses incurred, or of confinement by sickness, or of any unusual inconvenience. The practice in such cases in this court is well established. It is to reverse the judgment, and remand for a new trial, unless the plaintiff shall remit from his verdict so as to reduce it to such sum as the court shall deem satisfactory. *Potter v. Railway Co.*, 22 Wis. 615; *Goodno v. Oshkosh*, 28 Wis. 300; *Baker v. Madison*, 62 Wis. 137, 583; *McLimans v. City of Lancaster*, 63 Wis. 596; *Heddles v. Railway Co.*, 74 Wis. 239, 39 Am. & Eng. R. Cas. 645; *Waterman v. Railway Co.*, 82 Wis. 613.

Elements of
damage.

The case of *Baker v. Madison*, *supra*, is possibly misleading, and possibly does not express very clearly what was intended. The case had been tried three several times. The verdict on the third trial was much larger than on either previous trial. Indeed, it was twice as large, and so in fact afforded intrinsic evidence of passion and prejudice. This fact brings the case within the rule stated above, and followed

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by the later cases. It appears to this court that the verdict, after the remission of one-half, is yet too large by half.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial, unless within 30 days after the *remittitur* is filed in that court the plaintiff shall remit in writing from the verdict all damages in excess of \$350, and file such remission with the clerk of the trial court.

In that case judgment is to be entered for the plaintiff on the verdict for \$350 and the costs in the circuit court.

KANSAS CITY, FT. SCOTT & MEMPHIS RAILROAD CO.

v.

SOKOL (John).

(Supreme Court of Arkansas, Oct. 19, 1895.)

Action for Ejection of Passengers—Remarks of Counsel—Prejudicial Error—What Constitutes.—In an action against a railroad company for ejection of plaintiff from its train, and in which action the railroad company took a change of venue on the ground of local prejudice, the counsel for the plaintiff proposed to read to the jury the record of the facts shown by the motion for such change of venue; to this the defendant's counsel objected, whereupon plaintiff's counsel remarked, "I have no doubt they will try to interrupt me. It is the hit dog that always howls." Upon this the court remarked, "I expect that is an improper argument," to which plaintiff's counsel rejoined by urging that he had "a right to read the record in this case." This point was briefly buffeted between the court and counsel, whereupon plaintiff's counsel said, "I submit this that if the record show that this case was removed from Crittenden County upon the affidavit of these parties that they could not get a fair trial, that the feeling in Crittenden County is so strongly against them there, I submit that is a matter of record which can be read to the jury," from which the court dissented. *Held*, that such conduct on the part of the counsel was prejudicial error. (*Page 154.*)

Same—Same—Same.—In his argument to the jury, plaintiff's counsel stated that there were a great many passengers on board the train from which the plaintiff was ejected, and that "this railroad knows of everybody on there, where all those passengers are, and where they can be found, and they could have been brought here to testify." Counsel for defendant objected to this, and the court said that counsel must confine himself to the evidence, whereupon plaintiff's counsel substantially reiterated the objectionable remarks, and insisted that the railroad company had a record which showed where everybody got off the train, and that "it is probably true that they made investigation, and found out

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it would not do any good to bring them here." No evidence was in the case supporting any such statements. *Held* that such conduct of counsel was prejudicial error. (Page 155.)

APPEAL from Mississippi county circuit court. *Reversed.*

Adams & Trimble and Wallace Pratt, for appellant.

W. A. Percy and St. John Waddill, for appellee.

BATTLE, J.—John Sokol brought this action against the Kansas City, Ft. Scott & Memphis Railroad Company in the Crittenden circuit court to recover damages sustained by him through the unlawful acts of the defendant. He alleged that, having purchased of the defendant a ticket on the 24th of December, 1890, which entitled him to transportation over its road from West Memphis to Jericho, in this state, he entered a passenger train of the defendant going to Jericho, at West Memphis, and delivered his ticket to the conductor; and that thereafter, before he reached Jericho, without any fault or misconduct on his part, the employés of the defendant, with force and arms seized him and wantonly ejected him, with great indignity, from the train, to the ground below, whereby he was damaged in the sum of \$10,000. Case stated.

The defendant answered, and denied the allegations of the plaintiff, and alleged that he was drunk and disorderly on the train, and guilty of using profane and vulgar language in the presence of lady passengers, and otherwise so misconducted himself as to make it the duty of the conductor to eject him from the train.

The venue in the case was changed, on the application of defendant, from Crittenden to Mississippi county.

The issues were tried by a jury. The evidence adduced in the trial was conflicting. It was proved that Sokol entered a train of the defendant at West Memphis, and was put off by the conductor before he reached Jericho, the place of his destination, at a place which was not a station. But as to the delivery of a ticket or payment of fare by him to the conductor, witnesses were not agreed. The conductor and a brakeman testified that he did not, while he swore that he purchased a ticket from the defendant which entitled him to transportation in a passenger train over its road from West Memphis to Jericho, and delivered it to the conductor after entering the train and intro- Facts proven.

Ejection of Passengers K. C., Ft. S. & M. R. Co. v. Sokol

duced evidence corroborating his statement. As to the place he was put off, evidence was adduced tending to show it was a short distance beyond the station of Marion, near a trestle, and where the roadbed was four or five feet high, and a ditch filled with water was at the foot of the embankment. It was raining or sleeting at the time he was ejected.

Evidence was also adduced tending to show that Sokol was intoxicated and noisy at the time he was put off the train; that he used profane language in the presence of ladies; and that he attempted to sit in the lap of a colored woman, and when she remonstrated, cursed. But this evidence was contradicted by other testimony. It does not appear, however, that he was ejected on account of his noise, profane language, or improper conduct, but because he failed to pay fare, or deliver a ticket showing that he had done so.

Witnesses do not agree as to the manner in which he was ejected. Some testified that he was put off in a rude manner; was pitched off while the train was moving with such force that he fell down the embankment, and lay prostrate in the mud and water. Others testified that no violence was used, and that he alighted on his feet, and fell after the men who put him off had left him standing.

The conductor testified that he made a report to the defendant, showing how many tickets he received from West Memphis to Jericho on the day Sokol was ejected, which was sent to Kansas City, but he did not know whether it was then in existence, and did not remember what it showed. There was no evidence that any record was kept of the names of those who purchased tickets or delivered them to the conductor.

Upon the last argument of the case before the jury, Mr. Percy, counsel for plaintiff, who was making it, said:

Argument of "Now, gentlemen of the jury, why is this case here, and
counsel. why are the people of Mississippi county called upon to try a railroad company running through another county for an offense committed in that county? The case is here on a change of venue from the good county of Crittenden, and who got it? Gentlemen of the jury, how did it come here? We find the papers of this case after the trial of it at Marion."

Mr. Trimble, counsel for the defendant, interrupting, said; "If the court please, we think that is an improper argument."

Mr. Percy said: "I have no doubt they will try to interrupt me. It is the hit dog that always howls."

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The Court said: "I expect that is an improper argument."

Mr. Percy said: "I am not going to read any of the evidence in that case."

The Court: "I think it is improper to refer to the change of venue."

Mr. Percy: "I have a right to read the record in this case."

The Court: "I do not think the jury has anything to do with the change of venue."

Mr. Percy: "Your honor will not let me state to the jury why this case was brought from Crittenden county?"

The Court: "No, sir; because that might defeat the object the defendant had in bringing it from one county to another."

Mr. Percy: "Very well, sir. I don't blame them for wanting to keep that fact away from the jury."

Mr. Trimble: "Now, we except to that. We think that it is an improper statement to make to the jury."

The Court: "I think our supreme court has passed upon the question, and has properly held that it is entirely foreign to the case, and the jury should not consider and counsel should not argue it. I am satisfied Mr. Percy overlooked that at the time."

Mr. Percy: "I don't want to travel out of the record."

The Court: "It is not outside of the record, but it is not proper to comment on it, because it is not a matter that the jury have anything to do with."

Mr. Percy: "I submit this: that if the record shows that this case was removed from Crittenden county upon the affidavits of these parties that they could not get a fair trial, that the feeling in Crittenden county is so strongly against them there, I submit that is a matter of record which can be read to the jury."

The Court: "No, sir. It is not a matter you can read, or the jury can consider, in arriving at their verdict in the case."

Mr. Percy: "Very well, sir," etc.

Again, in the concluding portion of his argument, Mr. Percy said:

"A great many passengers were on board that train, some going to Kansas City. This railroad knows of everybody on there, where all those passengers are, and where they can be found, and they could have been brought here to testify."

Argument of
counsel con-
tinued.

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Mr. Trimble: "That is not in evidence, and not the truth."

The court said that counsel must confine himself to the evidence.

Mr. Percy: "That is all right. I say this: that they have a record showing where everybody got off that train, and they could, had they so desired, have made an investigation, and found where everybody got off that train. It is probably true that they made an investigation, and found out it would not do them any good to bring them here."

Later in his argument Mr. Percy said: "Now, gentlemen, taking their own theory of this lawsuit, that they put him off because he was too drunk to behave himself, could they sit there, and see him fall down,—a man in that condition, in that sort of weather? They knew that 10, 15, or 20 trains a day were running on that track, and the last that they saw of him was while he was falling down the side of the track. They did not know, and, in the language of Mr. Vanderbilt, they 'didn't give a damn,' whether the next train that came along ran over him or not."

Mr. Trimble: "If the court please, we object to that as an improper argument."

Mr. Percy: "Let the hit dog howl always. But these men know that what I am saying is so."

The Court: "I hardly think the expression used is in keeping with the dignity of the court, and counsel should not use such expressions."

Mr. Percy: "I used it in quotation. I have heard it spoken in that way. I say the inhumanity of patting a man off in that condition, in that sort of weather, is something these people should be made to smart for."

The jury returned a verdict in favor of the plaintiff for \$500, and the court rendered judgment accordingly, and the defendant appealed.

The remarks of counsel as to the change of venue and the record kept by the appellant were unquestionably improper. The question is, should the judgment of the trial court be reversed on account of them?

Question in
issue stated.

Courts are instituted for the purpose of enforcing the right and redressing wrongs, according to the laws. In jury trials, evidence is adduced for the purpose of ascertaining the truth, and instructions are given by the court to inform the jury as

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to the law applicable to the facts. Jurors should ascertain the truth from the evidence, and apply the law as given by the court to the facts as they find them, and return a verdict accordingly. Except as to those facts of which courts take judicial notice, juries should consider only the evidence adduced.

Arguments by counsel of the evidence adduced and the law as given by the court are allowed only to aid them in the discharge of their duty. Within these limits counsel may present their client's case in the most favorable light they can. When they go beyond them, and undertake to supply the deficiencies of their client's case by assertions as to facts which are unsupported by the evidence, or by appeals to prejudices foreign to the case, they travel outside of their duty and right, and abuse the privilege of addressing the jury by using it for a purpose it was never intended to accomplish; for such assertions or appeals can serve no purpose except to mislead the jury and defeat the ends of the law in requiring them to confine their consideration to the evidence adduced, and the law embodied in the instructions of the court. Hence it is the obvious duty of courts, in furtherance of the object of their creation, to prevent such assertions or appeals, or, when made, to remove their evil effects so far as they can; and attorneys, in the making of them, if they are calculated to prejudice the rights of parties, are guilty of a violation of the law, of an abuse of their privileges, of conduct unfair and unbecoming to their profession, and should be promptly and sternly rebuked by the court, and, if need be, punished. *Railway Co. v. Cavenesse*, 48 Ark. 131, 132; *Brown v. Swineford*, 44 Wis. 282; *Holder v. State*, 58 Ark. 473; *Ferguson v. State*, 49 Ind. 34; *Shular v. State*, 106 Ind. 304; and *Waldron v. Waldron*, 156 U. S. 361.

Limits of
arguments of
counsel.

While it is the duty of trial courts to confine counsel within the limits of legitimate debate, an omission to do this duty, while it may be a good reason for criticism, will not always entitle the appellant to a reversal of the judgment of the court below. A failure in this respect, which is not calculated to prejudice the cause of the appellant in the minds of honest men of fair intelligence, is not a ground for reversal. But material statements, made by counsel of appellee outside the evidence,

Prejudicial
error in argu-
ment.

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which were likely to injure appellant, and were excepted to by him at the time, and were not cured by the court, do constitute a good cause for reversal.

Ordinarily, "an objection by the opposing counsel, promptly interposed, followed by a rebuke from the bench, and an admonition from the presiding judge to the jury to disregard prejudicial statements," is sufficient to cure the prejudice; but instances sometimes occur in which it is not sufficient, as *Holder v. State*, 58 Ark. 473; *Combs v. State*, 75 Ind. 220.

The remarks of appellee's counsel in this case in respect to the change of venue were unquestionably improper, for the jury had nothing to do with that subject. The mild and doubting way in which the court sustained the objection to the remarks, and the positive manner in which counsel insisted upon his right to make them, were calculated to render the ruling of the court of no effect. When counsel for appellee sought to convert the objection of appellant's counsel into a confession that the record referred to was evidence damaging to the cause of appellant, the court said: "I expect that is an improper argument," and counsel for appellee, emboldened by the doubting manner in which the court expressed his opinion, positively and unqualifiedly asserted that he had "a right to read the record in this case."

When counsel said, "I don't want to travel out of the record," the court replied, "It is not outside of the record, but it is not proper to comment on it, because it is not a matter that the jury have anything to do with." Encouraged by this remark, counsel again insisted on his right to read to the jury the record showing the proceedings of the court in respect to the change of venue by saying: "I submit this: that if the record shows that this cause was removed from Crittenden county upon the affidavit of these parties that they could not get a fair trial, that the feeling in Crittenden county is so strongly against them there, I submit that is a matter of record which can be read to the jury."

And when the record as to the change of venue was in this manner brought before the jury, the court virtually bearing witness to the fact that counsel's statements were sustained by the record, counsel for appellee ceased to contend that it was proper for the jury to consider it. These statements, admitted by the court to be true, had then made their impres-

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sions upon the minds of the jury which could not be easily removed. The apparent doubt of the court, and the positive, unqualified, and repeated assertions of counsel were not likely to accomplish that effect. We think the statements were prejudicial to appellant. The liberal verdict of the jury tends to confirm us in that conclusion.

The statements made by counsel to the effect that appellant kept a record of the passengers on the train from which appellee was ejected, and knows where they are, and could produce their testimony, were unsustained by the evidence, and likewise improper, and should have been excluded from the jury. The other remarks objected to were based on evidence, except as to the 10, 15, or 20 trains passing daily over the track of appellant's railroad.

Argument outside of evidence - Error.

Appellant asked the court to instruct the jury as follows: "If the plaintiff had a ticket entitling him to ride from Memphis to Jericho, but failed or refused to exhibit or surrender his ticket, claiming that he had surrendered it to the conductor, when he had not, the conductor had a right to put him off anywhere; and, if he did put him off under these circumstances, your verdict should be for the defendant." And the court amended it by adding: "Unless the jury find from the proof that he was put off at an unsafe or dangerous place, and that he was thereby injured, or unless the employés of defendant's train used more force than was necessary in ejecting plaintiff from the train," and gave it as amended. Another instruction as to the right of appellant to eject appellee from the train for disorderly conduct was requested by appellant, and was amended by the court in the same manner, and given.

Appellant insists that these amendments were erroneous, "because there was no evidence whatever that appellee was put off at an unsafe or dangerous place, and was thereby injured, or that more force was used than was necessary." We do not find any evidence to show that the place was unsafe or dangerous, but there was to prove that more force was used to put him off than was necessary.

As the judgment in the case will be reversed, it is unnecessary to say more about these amendments. The defect indicated can be corrected in the next trial.

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The judgment of the circuit court is *reversed*, and the cause *remanded* for a new trial.

RIDDICK, J., being disqualified, did not sit in this case.

ABSTRACTS OF RECENT DECISIONS

(1) **Ejectment of Passengers**[(1) p. 162]—*Province of Jury on Conflicting Evidence as to Justification for Ejection*.—Where the evidence is conflicting as to whether or not an ejection was wrongful, the question is for the jury. *Charleston & S. R. Co. v. Varnadore*, 94 Ga. 639.

Same—*Smoking in Car—Conclusiveness of Verdict*.—Whether or not a person ejected from a train was smoking contrary to the rules of the company is a question for the jury upon conflicting evidence, and their finding will not be revised by the appellate court. *Nelson v. Salt Lake R. T. Co.*, 10 Utah 196.

Same—*Misleading Instruction as to Number and Credibility of Witnesses*.—In an action to recover for an alleged unlawful ejection, a charge to the jury, upon the issue as to the force used, that the testimony of a greater number of credible witnesses whose statements are reliable on one side may be considered of more reliance and more worthy of confidence and trust than the testimony of an equal number of witnesses of equal credibility on the other side, is misleading as dealing only with the question of credibility and leaving the jury to determine the issue upon the mere preponderance of numbers on one side or the other without calling their attention to the relative intelligence of the witnesses, their opportunity to observe what took place, what attention they paid to the occurrence, or their ability to recall and state it in its details correctly. *Schmitt v. Milwaukee St. R. Co.*, 89 Wis. 195.

Same—*Instructions as to Credibility of Witnesses—Falsus in Uno Falsus in Omnibus*.—In an action to recover for an alleged unlawful ejection, an instruction that if the jury believe that any witness has been guilty of telling what is untrue, of wilfully and knowingly stating a falsehood, then they are at liberty to reject his entire testimony, is erroneous. *Schmitt v. Milwaukee St. R. Co.*, 89 Wis. 195.

The court said: "The law is very well settled that in order to authorize the jury to reject the entire testimony of a witness, on the ground that he had knowingly testified falsely in the case, such false testimony must have been in relation to some material fact. *Mercer v. Wright*, 3 Wis. 645; *Morely v. Dunbar*, 24 Wis. 193. This was so held in the recent case of *Little v. Railway Co.*, 88 Wis. 402, in which many authorities are cited to the same effect."

Same—*Liability of Company for Expulsion by Lessee of a Train*.—Public policy and the law alike forbid that a railroad company should be allowed to place its road, trains, train hands, and cars in

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the hands of or under control of a stranger, and, hence, a railroad company leasing a train and train hands to a private person for excursion purposes is liable for the forcible expulsion by the lessee of a person in possession of a ticket issued by the company and who entered upon the train for the purpose of transportation. *Chesapeake & O. R. Co. v. Osborne* (Ky., 1895), 30 S. W. Rep. 21.

Same—Ejection of Trespasser—Unnecessary Force.—It is the duty of railway employes to use no greater violence than is necessary in ejecting trespassers from trains, and where more than necessary force is used in ejecting a trespasser from a rapidly moving train so as to seriously injure him, the company is liable. *St. Louis S. W. R. Co. v. Huffman* (Tex. Civ. App., 1895), 32 S. W. Rep. 30.

Same—Admissibility in Evidence of Declaration of Conductor—Res gestæ.—The declaration of a conductor, made eight or ten minutes after the ejection of a passenger, that the person ejected ought to have broken his neck, is inadmissible as a part of the *res gestæ*. *Barker v. St. Louis, I. M. & S. Ry. Co.*, 126 Mo. 143.

Same—Submission of Question of Exemplary Damages to Jury [(4) p. 161].—The improper admission of testimony that eight or ten minutes after an ejection the conductor who had assisted therein said that the plaintiff ought to have broken his neck is reversible error, where the jury had submitted to them the question of exemplary damages. *Barker v. St. Louis, I. M. & S. R. Co.*, 126 Mo. 143.

Same—Ejection of Trespasser—Proof as to Authority of Train Hands.—In an action to recover for injuries sustained by the ejection of a trespasser from a moving train by the porter thereon, it is competent to show the general authority of porters in this respect on the line in question, and where testimony in that regard has been introduced without objection, it is immaterial that evidence was also admitted as to the general and customary authority of porters of all roads. *St. Louis S. W. R. Co. v. Huffman* (Tex. Civ. App., 1895), 32 S. W. Rep. 30, citing *Letcher v. Morrison*, 79 Tex. 240.

Same—Injury to Passenger Violating Contract of Carriage—Liability of Company.—A shipper of live stock, who had signed a written contract with the railway company to remain in the caboose car attached to the train carrying his stock, while the same was moving, is not entitled to recover for injuries received by him while voluntarily standing or walking upon a moving car, in violation of the terms of his contract. *Ft. Scott, W. & W. R. Co. v. Sparks* (Kan., 1895), 39 Pac. Rep. 1032.

The court in this connection said: "When Sparks [the shipper] was knocked off the top of the caboose he was severely injured. Under the written contract between the Ft. Scott, Wichita & Western Railway Company and Sparks, the latter was required to "remain in the caboose car attached to the train while the same is in motion." This was a reasonable contract. It was intended for the safety and convenience of Sparks, who was a passenger, as well as for the protection of the railway company. It does not contravene any law or a sound public policy. We perceive no good reason why its provisions may not be fully enforced.

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Goggin v. Railroad Co., 12 Kan. 416; *Sprague v. Railway Co.*, 34 Kan. 351, 23 Am. & Eng. R. Cas. 684; *Express Co. v. Foley*, 46 Kan. 457, 46 Am. & Eng. R. Cas. 680; *Railway Co. v. Langdon*, 92 Pa. St. 21; *O'Donnell v. Railroad Co.*, 59 Pa. St. 239; *Creed v. Railroad Co.*, 86 Pa. St. 139, *distinguished*; *Sedgwick v. Railroad Co.*, 73 Iowa, 158, 31 Am. & Eng. R. Cas. 207; *Bates v. Railroad Co. (Mass.)*, 17 N. E. 638. Sparks, when he climbed upon the top of the car attached to the stock train, and stood there or walked upon the top of the cars while the train was in motion, was not only in a place of obvious danger, but was also violating the express terms of his written contract. *Railroad Co. v. Lindley*, 42 Kan. 714, 41 Am. & Eng. R. Cas. 72; *Player v. Railway Co.*, 62 Iowa 723, 12 Am. & Eng. R. Cas. 112; *Martenson v. Railroad Co.*, 60 Iowa 705, 11 Am. & Eng. R. Cas. 233; *Goldstein v. Railway Co.*, 46 Wis. 404, 2 Wood, Ry. Law, pp. 1109-1114, § 304; *Railway Co. v. Langdon*, *supra*; *Railway Co. v. Miles*, 40 Ark. 298, 13 Am. & Eng. R. Cas. 12, *Thomp. Corr.* 265."

Same—Pleading and Proof—Evidence as to Ejection at Improper Place.—There is no error in allowing a plaintiff to testify that at the place where she was ejected from the car there was no protection for ladies or strangers, with reference to the police, although the absence of such protection was not alleged in the declaration. *Atlanta Consol. St. R. Co. v. Hardage*, 93 Ga. 457.

Same—Admissibility of Evidence as to Reasons for Taking Car in Question.—In an action for wrongful ejection it appeared that the conductor of defendant's car was informed that the plaintiff and her child were sick when they boarded the car, and it was held no error to allow the plaintiff to testify that she took the car because of the sickness of herself and child, or that her husband desired her to take the car for this reason. *Atlanta Consol. St. R. Co. v. Hardage*, 93 Ga. 457.

(2) Expulsion for Non payment of Fare [(1) p. 162]—Non-payment of Fare—Voluntary Leaving of Train—Liability of Company.—A railway company is not liable to a schoolgirl ten years of age, who, boarding a train in company with three other schoolgirls, tenders half the usual fare for all, and who, on being told that the amount would only be received as the fare of herself and another, accepted the money back and got off at the next station in company with the others, where there is no evidence that any violence, oppression or force was used on the part of the railway employes. *Cox v. Los Angeles Ter. R. Co. (Cal. 1895)* 41 Pac. Rep. 794.

Same—Former Acceptance of Less than Usual Fare—Offer of Passenger to Pay Difference.—The fact that on a former occasion another conductor had allowed the plaintiff and two others to ride for less than the usual fare, or that a passenger offered to pay the difference between the amount offered and the amount demanded, would not have the effect to render the company liable. *Cox v. Los Angeles Ter. R. Co. (Cal. 1895)* 41 Pac. Rep. 794.

Same—Ejection by Conductor without Badge—Effect of Statute Requiring Employes to Wear Badges—Recognition of Employé without Badge as Conductor.—The Civil Code of California, § 488, requires

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railway employes to wear badges indicating their official position, and provides that a conductor not complying with the section cannot demand or receive fare from passengers. *Held*, that a passenger who recognized an employé without a badge as a conductor, treated him as in all respects as duly authorized, and made no objection on the ground that he wore no badge, could not from the mere fact that the conductor failed to comply with the statute, hold the company liable because of an ejection by such conductor. *Cox v. Los Angeles Ter. R. Co.*, (Cal., 1895) 41 Pac. Rep. 794.

Same—Breach of Conditions on Ticket—Ejection of Passenger [(1) p. 162].—The purchaser of a "round trip" ticket contracted with the several roads over whose lines the ticket entitled him to passage, that on the day of his departure returning he would identify himself as the original purchaser by his signature and otherwise, if necessary, in the presence of the ticket agent at the place to which the ticket was sold, who should witness the same, that the ticket should be void if the conditions were not complied with; and that he would not hold any of the roads liable for any statement made by any employé not in accordance with the contract. The argument further provided, that no employé or agent of any of the lines should have any power to alter, modify or waive any of the conditions named in the contract. On his departure, the purchaser offered to identify himself before the local agent and requested him to sign the ticket, which he refused, saying that it was unnecessary. Thereafter he was ejected on one of the roads forming the line because his ticket was not signed or witnessed as required by its terms. *Held*, that there was a breach of the contract, and that no recovery could be had for the expulsion. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (Meredith, Intervener), U. S. Cir. Ct. N. D. Ga., 65 Fed. Rep. 332. *Following Mosher v. St. Louis & R. Co.*, 127 U. S. 390; 34 Am. & Eng. R. Cas. 339.

(3) Ejection of Passenger for Disorderly Conduct [(2) p. 164].—*Profanity in Street-car*.—If, in a car filled with passengers, nearly one-half of whom are ladies, a man in earnest conversation undertakes to emphasize his statements, as some men are apt to do, by saying, "By God," it is so, or "By God," it is not so, the law makes it the duty of the conductor to check him; and, if the latter denies his guilt, and, upon being assured by the conductor that he was guilty, flies into a passion, and calls the conductor a "damned liar," he may rightfully be removed from the car; not as a punishment for his insult to the conductor as an individual, but to vindicate the authority of the law, which forbids the use of such language in a street car, or any other public place where women and children have a right to be. The fact that the offender was innocent of the misconduct with which he was at first charged can be no excuse for his subsequent offense. He cannot excuse the use of indecent or profane language in a street-railway car by proof that he was first

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falsely charged with the use of similar language. *Robinson v. Rockland, T. & C. St. R. Co.*, 87 Me. 387.

Same—*Right of Conductor of Street-car to Remove Passenger Using Inaeent Language.*—In Maine the use of indecent or profane language in a street-railroad car is a breach of the peace, and the conductor of the car may immediately arrest any person guilty of such breach of the peace, and hold him till a warrant can be obtained; or he can be placed in custody of the proper officers of the law; or the conductor may remove a person guilty of such breach of the peace from the car. *Robinson v. Rockland T. & C. R. Co.*, 87 Me. 387.

Same—*Admissibility in Evidence of Rule Prescribing Conductor's Duties—Sufficiency of Instruction—Harmless Error.*—In *O Loughlin v. Boston & M. R. Co.* (Mass., 1895), 41 N. E. Rep. 121, which was an action by a passenger for alleged wrongful ejection from a train, in which the defense was that plaintiff was intoxicated and used indecent language, the court charged as follows: "Railroad corporations are public corporations, to some extent. They are what is known as 'quasi-public corporations.' They are bound to take every person who presents himself in a proper manner, and carry him upon their trains. And, being obliged to do that, of course it is right and reasonable for them to have reasonable rules, reasonable orders, and have reasonable and proper conduct upon their trains; and I might say, so far as the passengers are concerned,—so far as this passenger is concerned,—he has a right, when he engages his passage upon the train, that the railroad officials shall see to it that he is not annoyed by unseemly talk, by improper talk, by improper actions, upon the train; that is, it is the duty (and I am speaking now of the rights of the passengers), or it becomes the duty, of the railroad corporation, on behalf of all the passengers, to see to it that no person upon that train (either a railroad official or a passenger upon that train) shall conduct himself improperly, either by conversation which is improper conversation, swearing, or improper or indecent language, or by intoxication, or by violence of any kind. It is not only the right of the railroad, but it is the duty of the railroad, to see that all things of that kind are suppressed, and are not countenanced or allowed, upon the train, so as to be an annoyance to the passengers upon the road, because, when a passenger contracts for transportation from one point to another, he has a right to have it in a way that he can enjoy it, reasonably and properly. * * * Each passenger must conduct himself towards the other passengers so as not to annoy; and, if any passenger does not do that, it is the duty of the railroad corporation to see that he does it; and, if it is necessary, in order to maintain that degree of order on the train, the railroad corporation will have the right, even between stations, to eject a passenger, and use force, if it is necessary." Excluded the following rule: "Rule 72. In this interview with passengers he [the conductor] must be civil and obliging. He must see that order and decorum are pre-

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served in the cars, and prevent the annoyance of passengers by the rude and improper conduct of others," and rendered the following decision :

FIELD, C. J.—The rule of the company should have been admitted in evidence, but a majority of the court are unable to see that the defendant was harmed by the exclusion of it. *Com. v. Power*, 7 Mete. (Mass.) 596 ; *O'Brien v. Railroad Co.*, 15 Gray 20 ; *Wills v. Railroad Co.*, 129 Mass. 351, 2 Am. & Eng. R. Cas. 27 ; *O'Neill v. Railroad Co.*, 155 Mass. 371. The rule was very general in its terms, and the rule of law given by the court to the jury for their guidance was more specific, but was the same, in substance, as the rule of the company.

(4) **Damages for Ejection** [13] p. 164]—*Right to Substantial Damages—Production of Ticket or Willingness to Pay Fare.*—A passenger may recover substantial damages for being ejected from a car when he either produced a ticket or stood ready to pay the legal fare. *Zagelmeyer v. Cincinnati, S. & M. R. Co.*, 102 Mich. 214, following *Hufford v. Railway Co.*, 53 Mich. 121, 18 Am. & Eng. R. Cas. 336 ; *Same v. Same*, 64 Mich. 631, 28 Am. & Eng. R. Cas. 129.

Same—Measure of Damages—Ejection by Policeman Called by Conductor.—A passenger who leaves a street-car by direction of a policeman, called for that purpose by the conductor, in causing the ejection, is not restricted to a recovery for the mere trouble and inconvenience caused him by being put off the car, and the additional expense necessary to complete his journey, where the action of the conductor was wrongful. *Laird v. Pittsburg Traction Co.*, 166 Pa. St. 4.

Same—Injury to Business or Professional Reputation.—In an action for a wrongful ejection plaintiff cannot recover for injury to his business or professional reputation. *Schmitt v. Milwaukee St. R. Co.*, 89 Wis. 195.

Same—Loss of Time as an Element of Damage.—In an action for wrongful ejection, it is error to submit to the jury loss of time as an element of damages, unless a proper basis for such damages is found in both the pleadings and the evidence. *Gulf C. & S. F. R. Co. v. Sparger*, (Tex. Civ. App., 1895) 32 S. W. Rep. 49. *Citing Railway Co. v. Robinson*, 73 Tex. 277 ; *Railway Co. v. Measles*, 81 Tex. 478 ; *Railway Co. v. Richart*, (Tex. Civ. App., 1894) 27 S. W. Rep. 921 ; *Railway Co. v. Bigham*, (Tex. Civ. App., 1895) 30 S. W. Rep. 254 ; *Campbell v. Cook*, 80 Tex. 632 ; *Railway Co. v. Rossing*, (Tex. Civ. App., 1894) 26 S. W. 243.

Same—Exemplary Damages—Georgia Code.—In an action by a married woman against a common carrier for wrongful expulsion from a car, section 3066 of the Code, which provides that: "In every tort, there may be aggravating circumstances either in the act or the intention, and in that event, the jury may give additional damages either to deter the wrongdoer from repeating the trespass, or as com-

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compensation for the wounded feelings of the plaintiff," may apply, both in letter and spirit; but the terms of section 3067, providing that "in some torts the entire injury is to the peace, happiness or feelings of the plaintiff. In such case no measure of damages can be prescribed except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attending circumstances should be weighed," are not literally applicable, though the principle of the section, except as to considering the worldly circumstances of the parties, is applicable in so far as injury to the feelings is concerned. *Atlanta Consol. St. R. Co. v. Hardage*, 93 Ga. 457.

Same—Exemplary Damages—Degree of Force Used.—A passenger on a tramway who presents a transfer ticket which the conductor refuses to honor, cannot recover exemplary damages for his ejection from the car when no more force was used than was necessary for the purpose. *Denver Tramway Co. v. Cloud*, (Colo. App. 1895) 40 Pac. Rep. 779.

Same—Excessive Damages—Absence of Evidence Justifying.—A verdict of \$500 in favor of a girl ten years of age, who voluntarily left a train at a station by the implied direction of the conductor because refusing to pay the regular rate of fare, is excessive, in the absence of evidence justifying exemplary or punitive damages. *Cox v. Los Angeles Ter. R. Co.*, (Cal.) 41 Pac. Rep. 794.

Same—Same—Ejection of Trespasser.—One thousand dollars is not excessive damages for injuries sustained by a trespasser by reason of his forcible ejection from a train running at a high rate of speed. *St. Louis S. W. R. Co. v. Huffman*, (Tex. Civ. App., 1895) 32 S. W. Rep. 30.

Same—Interference of Appellate Court with Verdict.—Although the amount of a verdict for an unlawful ejection may be large, yet if it be not so large as to justify the imputation of bias or prejudice, and the trial court has approved the finding, the appellate court, though it may not fully concur, has no legal power to interfere. *Charleston & S. R. Co. v. Varnadore*, 94 Ga. 639.

Same—Construction of Complaint—Recovery on Contract or in Tort.—A complaint in an action to recover damages for ejection from a street-car, which alleges the payment of fare and a promise by the company to carry the plaintiff, states the fact of ejection and claims damages therefore, will not limit plaintiff's recovery to one as for a breach of contract. *Denver Tramway Co. v. Cloud*, (Colo. App. 1895) 40 Pac. Rep. 779.

NOTES

(1) **Ejectment of Passengers—Non-payment of Fare as Ground for Ejectment.**—The right generally of railroad companies to eject from their trains persons who refuse to pay fare when requested by the

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conductor may be conceded; but this right must be exercised with proper regard to the physical and mental condition of the person, and also to the surrounding circumstances. Where, therefore, a person who refuses to pay his fare upon demand, is in such physical and mental condition that subsequent bodily harm may result from his ejection from the train, it is culpable and actionable negligence for the conductor of a train to eject such person, notwithstanding that he is in fact, because of his refusal to pay fare, a trespasser. *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 16 Am. & Eng. R. Cas. 390.

A carrier of passengers is not required by the common law to eject a passenger at one place rather than another, and while the law will not permit a person to be wantonly exposed to peril, there is no rule which requires any consideration to be shown for the mere convenience of a wrongdoer. *Great Western Ry. Co. v. Miller*, 19 Mich. 305.

A passenger who refuses to pay his fare deprives himself of the right to insist upon courteous treatment from the employés of the company, and cannot complain of their misconduct; he in fact becomes a trespasser and is no longer entitled to the rights and privileges of a passenger, and may rightfully be ejected from the train by the employés of the company. *Stone v. C. & N. M. R. Co.*, 47 Iowa 82.

When a passenger without a ticket, in good faith and in the belief that it is the proper fare, tenders to the conductor, when collecting fares on the cars, the ticket fare, and the conductor receives it, knowing it is tendered in good faith as the proper fare, it is an acceptance of the amount tendered as the full fare. In such case, the conductor cannot retain the fare then tendered and eject the passenger although the amount be the proper fare when paid on the cars to the place for which it is tendered. *Du Laurans v. First Division, St. P. & P. R. Co.*, 15 Minn. 29.

A passenger has not the right to resort to force to compel the performance of the contract of carriage represented by his ticket; and therefore, where a person upon a train by mistake of the local ticket agent has a ticket to a station where the train does not stop, he must either pay the extra fare demanded, or get off when ordered so to do; and he cannot lawfully invite force in his ejection or removal merely to make a case against the company or to increase his damages. *Atchison, T. & S. F. R. Co. v. Grant*, 38 Kan. 608, 34 Am. & Eng. R. Cas. 290.

In an action brought by a married woman and her husband against a railroad company to recover damages for putting her off at a wrong and improper place, evidence that she was so put off at the request of her husband, made without her knowledge, is inadmissible, she perhaps not being bound thereby. *Baltimore, C. & P. Ry. Co. v. Pixlev*, 61 Ind. 22.

Same—Tender of Fare During and after Ejection—Effect.—If

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a passenger be ejected from a train for failure to pay his fare, and after the train is in motion, he tenders it, the conductor is not bound to stop the train to receive his fare and take him on board: but if the tender be made while the train is standing still, the conductor is bound to receive the fare and admit the passenger. *South Carolina R. Co. v. Nix*, 68 Ga. 572.

And a passenger, who for nonpayment of his fare, has been ejected from a railroad car, at a place where there is no station, cannot, by climbing upon the train again before it starts and tendering the fare, obtain a right to be carried thereon. *O'Brien v. Boston & W. R. Co., et. al.*, 81 Mass. 20.

So, too, a passenger who enters a railroad car at one station and is properly expelled from it for nonpayment of his fare at a second, is not entitled to be carried to a third station by the same train of cars by entering the car between the second and third stations. *Swan v. Manchester & L. R. Co.*, 132 Mass. 116, 6 Am. & Eng. R. Cas. 327.

A passenger who insists to a passage by force of a spent ticket, and who refuses to pay his fare, may be ejected from the cars in compliance with a regulation of the company, and being thus expelled, he has no right to re-enter the cars upon producing, after his expulsion, a regular ticket which, while in the cars, he had kept back, producing the spent ticket as his sole passport. *State v. Campbell*, 32 N. J. L. 309.

The weight of authority is that a passenger who has first violated the contract of passage by a failure to pay his fare at the proper time upon demand, cannot, by tendering the fare when he is being put off, or upon a re-entry after ejection, acquire a right to passage, but the strict rule ought perhaps to be confined to wilful violations of contract. *Louisville, N. & G. S. R. Co. v. Harris*, 9 Lea (Tenn.) 180, 16 Am. & Eng. R. Cas. 374.

(2) **Same—Ejection for Disorderly Conduct.**—Persons guilty of rude, profane, disorderly, or indecent conduct in the cars of a railroad company should be at once expelled, as it is the duty of passenger carriers to repress such demonstrations. *Pittsburgh & C. R. Co. v. Pillow*, 76 Pa. St. 510.

(3) **Damages for Ejection from Trains.**—*Measure and Elements of Damage.* - A passenger can only recover for a wrongful expulsion from the car of a railroad company, such damages as he has absolutely sustained, and which he could not have averted by reasonable exertion, care and prudence, unless he was rejected in a wanton, rude or aggravating manner indicating oppression, malice, or a desire to injure, in which event he can recover punitive or exemplary damages from the company, especially where, after knowledge of the fact, they retain in their employ and in the same capacity the servant who has been guilty of such misconduct. *Graham v. Pacific R. Co.*, 66 Mo. 536.

In an action based upon an alleged unlawful removal of plaintiff

from defendant's train, he cannot recover damages for the manner in which it was effected, if it is found to have been justifiable. *Logan v. Hannibal & St. J. R. Co.*, 77 Mo. 663, 12 Am. & Eng. R. Cas. 140.

Where a person purchased a ticket and entered a train, and was ejected therefrom within half a mile from the place where he had embarked, without sustaining any bodily injuries, the conductor using no more force than was necessary to eject him, and where such person was delayed one day, and had to buy another ticket to his place of destination at an expense of \$40.50, it was held that it was not a case warranting exemplary damages, and that a verdict of \$5000 was so excessive as to indicate passion or prejudice upon the part of the jury. *Quigley v. Central Pac. R. Co.*, 11 Nev. 350.

To warrant a jury in finding exemplary damages, either malice, fraud, violence or oppression must be shown to have mingled in the wrongful act complained of. *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607.

A passenger is not entitled to exemplary damages for an ejection from a railroad train where the conductor acts in good faith with no malice to the passenger, and uses only such force as is necessary for his removal, although he may be mistaken as to his duty and the plaintiff's rights. *Logan v. Hannibal & St. J. R. Co.*, 77 Mo. 663, 12 Am. & Eng. R. Cas. 140.

Where a passenger is expelled from a sleeping-car under a mistaken sense of duty on the part of the conductor, and the facts show that it was not done wilfully, maliciously and wantonly so as to justify the imposition of exemplary damages, the damages awarded should, in some degree, be proportionate to the magnitude and character of the actual wrong done. *Pullman Palace Car Co. v. Reed*, 75 Ill. 125.

The facts in this case showed that a passenger had purchased a ticket for a particular berth in a sleeping car and had lost the same, but gave satisfactory assurance that he had made such purchase, but he was expelled from the sleeping car; there was no abusive language or personal violence used by the conductor in charge, who acted upon an honest purpose to execute a reasonable rule of the company, although through a mistaken judgment. It was held that a verdict for \$3000 damages was grossly excessive, and that in such a case, where men might honestly differ in opinion, and where the passenger might have kept his berth by paying the fare of \$1.50, but would not, he was only entitled to recover the price he had paid for his ticket, and a reasonable compensation for the trouble and inconvenience he suffered by being deprived of his berth in the sleeping-car. *Id.*

A judgment will not be disturbed on the ground of excessive damages, where the right to recover damages was clearly established, and it does not appear that the sum assessed is so disproportionate to the injury as to bear marks of passion, prejudice, or corruption on the part of the jury. *Graham v. Pacific R. Co.*, 66 Mo. 536.

In *Townsend v. New York, C. & H. R. Co.*, 56 N. Y. 295, plain-

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tiff purchased a ticket on the defendant's line from S. to R., and took passage on a train which only went a part of the way. The conductor on the train took up and retained the ticket without giving any check or other evidence of a right to a passage on the next train. Plaintiff took the next train for R. and informed the conductor that the conductor of the preceding train had retained his ticket. The conductor thereupon demanded the fare, and it being refused, ejected the plaintiff. *Held*, (1) That even if plaintiff was ejected on his refusal to pay fare he could not recover exemplary damages for the ejection from the train. But (2), that plaintiff was not justified in such refusal.

UNASSIGNED RECENT DECISIONS

Right to Ride on Train without Payment of Fare—Constitutional Declaration that Railroads are Public Highways.—The state constitution which provides (in Art. 12, § 14) that railroads are public highways does not authorize persons to ride on trains without payment of fare and in defiance of the regulations and management of the company. *Farber v. Missouri Pac. R. Co.*, 116 Mo. 81. *Citing Hyde v. Railway Co.*, 110 Mo. 272, 54 Am. & Eng. R. Cas. 157.

Power of Municipality to Bargain for Rates in Consideration of Right of Way.—In the absence of constitutional authorization a municipality has no power in consideration of the use of its streets by the company, to bargain with a railroad company for rates of transportation to distant points for its inhabitants and others. *City of South Pasadena v. Los Angeles T. R. Co. (Cal.)*, 41 Pac. Rep. 1093.

Constitutionality of Kentucky Act Requiring Separate Cars for White and Colored Persons.—The Kentucky Act of May 24, 1892, which requires separate cars to be furnished for white and colored persons travelling on railroads in the state, and which prohibits differences or discrimination in the quality, convenience or accommodations of the cars or coaches set apart for white and colored passengers, is not in contravention of the fourteenth amendment to the constitution of the United States, which prohibits discrimination by the state because of race or previous condition of servitude; but since the act is broad and comprehensive and embraces all passengers, whether their passage commences and ends in the state of Kentucky, or commences in a foreign country, or another state of the Union, and ends elsewhere than in the state, it is a violation of article 1, sec. 8, of the Constitution of the United States, reserving to Congress the exclusive right to regulate commerce with foreign nations and among the several states. *Anderson v. Louisville & N. R. Co. (U. S. Cir. Ct., Dist. Kv.)*, 62 Fed. Rep. 46.

Constitutional Prohibition of Acceptance of Free Pass by Public Official—Notary Public as Public Official.—A notary public is within the provisions of Art. 13, § 5, of the New York Constitution of 1895, which

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prohibits a public officer or person elected or appointed to a public office under the laws of the state from receiving any free pass or free transportation, etc. *People v. Rathbone*, 145 N. Y. 434.

Same - Acceptance of Pass Prior to Constitution Taking Effect. Art. 13, § 5, of the state constitution of 1895, which prohibits public officers from riding on free passes, applies to a notary public who received a pass before the constitution went into effect. *People v. Rathbone*, 145 N. Y. 434.

Person on Railroad Premises with Intention of Engaging Passage.—Where a person comes upon the premises of a railroad company at the station, with a ticket or for the purpose of purchasing one, he becomes a passenger. *Tillett v. Lynchburg & D. R. Co.*, 115 N. Car. 662.

Limitation of Liability—Iowa Statute—Regulation of Interstate Commerce.—Code Iowa, § 1308, providing that "No contract, receipt, rule, or regulation, shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation, been made or entered into," is not, as respects a contract made in Iowa for carriage from that state into Illinois, a regulation of interstate commerce. *Solan v. Chicago, M. & St. P. R. Co. (Iowa)*, 63 N. W. Rep. 692.

ZION (J. M.)

v.

SOUTHERN PACIFIC CO.

(United States Circuit Court, District of Nevada, March 18, 1895),

Action for Wrongful Ejection—Excessive Damages [(3) p. 164].—In an action by passenger to recover for a wrongful ejection from defendant's train, it appeared that plaintiff presented a tourist ticket bearing his signature, together with a description of his personal appearance, and on failing to identify himself satisfactorily to the conductor, who acted discourteously, the latter tore off a coupon and refused to return it, and on the next division he was ejected, and that plaintiff suffered a detention of two days and incurred expenses of about \$7.50. *Held*, on a motion for a new trial that a verdict of \$1700 dollars was so excessive as to indicate that the jury were actuated by bias or prejudice, and that unless plaintiff would agree to remit \$850 a new trial would be granted. (*Page 176.*)

MOTION for new trial.

R. M. Clarke and Charles A. Jones, for plaintiff.
J. L. Wines and W. E. F. Deal, for defendant.

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HAWLEY, D.J.—This action was brought by the plaintiff upon the 25th day of December, 1893, to recover damages alleged to have been sustained by reason of his having been wrongfully ejected from a passenger car on defendant's railroad at Reno, Nev., on April 3, 1893.

Case stated. The case was tried before a jury, and a verdict rendered in favor of plaintiff for \$1700.

Defendant moves for a new trial upon the ground that the verdict is so excessive as to indicate passion, prejudice, and bias upon the part of the jury.

The facts of the case are as follows:

The plaintiff is 46 years old, a married man, and resides in Indiana, and is engaged in farming and growing fruits. He had a contract with D. Appleton & Co., book publishers, for the sale of their Universal Geography of points west of the Rocky Mountains, and had been engaged in that business, off and on, for about 15 years. On the 18th day of October, 1892, he purchased a tourist ticket in Chicago to San Diego and return, for which he paid \$104, which ticket was good over the road of defendant from Ogden, Utah, to Los Angeles, Cal., and return, subject to the following, among other, conditions: "(5) It is not good for return passage unless the holder identifies himself as the original purchaser, to the satisfaction of the authorized agent at the return starting point on or before the date of departure returning; and when officially signed, dated in ink, and duly stamped on back hereof by said agent, this ticket shall then be good only to date cancelled in margin. [The time cancelled in margin had not expired.] (6) The holder will identify himself as the original purchaser of this ticket by writing his name, or by other means, if necessary, when required by conductors or agents."

Facts. The ticket, upon its face, contained a description of the passenger as to sex, size, age, color of eyes, and character of beard, which, in all these particulars, answered the description of the plaintiff. The plaintiff traveled upon this ticket from Chicago to San Diego unmolested. Upon his return he complied with the fifth condition thereof. His signature on the ticket at the time of the purchase at Chicago and upon his return at San Diego were substantially alike. He traveled upon his return on the defendant's road from Los Angeles to Lathrop. There he got a stop-over check; paid his fare

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from Lathrop to Berkley. The ticket entitled him to stop-over privileges.

After remaining in that city for about one month he bought a ticket to Sacramento, and checked his trunk to Colfax. At Sacramento he presented his regular ticket on the main line of the defendant's road, over which he was entitled to ride. The conductor took off the coupon "Los Angeles to Ogden." After leaving Sacramento, plaintiff asked the conductor for a stop-over check at Colfax, as he wished to go to Nevada City, Cal. The conductor took his ticket, and he was asked to sign his name on the conductor's memorandum book, which he did. He signed his name with a different signature from the signature on the ticket.

The plaintiff testified that when he signed his name at Chicago it was at a small window, with little space, and the initials "J. M. Z." were lettered, while in writing his name for the conductor he wrote the initials in the usual way. The conductor came back, and informed plaintiff that he could not issue a lay-over on that ticket. Plaintiff said: "Is that so? Why not? That is pretty rough on me." The conductor said: "It ain't the same name that is on the ticket." Plaintiff said: "Surely you are mistaken. The name on the ticket is J. M. Zion, and my name is J. M. Zion, and I wrote my name on the piece of paper. Do you doubt it? There might be some difference in the style of the signature, but that is my name; and, if you will please hand me back my ticket, I will write my name the same as it is on the ticket. Then you can see whether it is my name or not." The conductor said, "No, you can't fool me that way." Plaintiff then said, "Probably you think I am lying about it, or forged it." The conductor replied, "It looks like it." This conversation occurred in the presence of several passengers. The conversation continued for some time. The conductor refused to return the coupon for Ogden, or give a stop-over.

When the train arrived at Colfax the conversation was renewed. Plaintiff got off the train with his valise and hatbox, and, at the request of the conductor, wrote his name on loose slips of paper, two or three different ways, but none of the signatures bore a close resemblance to the signature on the ticket. There was considerable excitement. The bell was ringing, and passengers crowded around to see how the matter would terminate. The

**Facts con-
tinued.**

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train commenced moving, and the conductor said, "They are just going to take water." Plaintiff hurried up, and succeeded in getting in the last coach. After the train left Colfax the conductor said to plaintiff: "I have received a dispatch from Mr. Goodman, general passenger agent of the road, that, if I am satisfied you are a scalper, not to allow you to proceed. I will have to put you off unless you pay your fare." Plaintiff declined to pay his fare, stating that he had paid it once, and explained to the conductor under what surroundings he had signed the ticket in Chicago. He told the conductor that he did not want any trouble, and asked him to give a receipt for the coupon from Los Angeles to Ogden, which he had taken up and refused to return, so that it could be shown to the next conductor. The conductor refused to give any receipt, or to give up the ticket. This request and refusal were repeated several times. At Truckee, which is at the end of the division, a new conductor came on the train. Plaintiff handed him the remaining part of his ticket, reading from Ogden to Chicago. The conductor said: "There is no transportation on that over my division. You will have to pay your fare or get off." This conductor treated plaintiff considerately and fairly. After he had taken up the ticket, he approached plaintiff and said: "What is the trouble between you and the other conductor?" What occurred thereafter is testified to by plaintiff as follows: "I told him what had passed, where I had been, when I left my home in Berkley, and the trouble I had had with the conductor about the signature; told him I could satisfy him that I was J. M. Zion, and was willing to do anything reasonable. Then I showed him my hat-box,—I didn't think about it till afterwards,—that the name 'J. M. Zion' was on the bottom. I showed him that. I had told the former conductor that I had put all my papers in the trunk, but I thought I would look in my valise; and in the back part I found an old letter from D. Appleton, and a shipping-receipt given by the express company, and * * * a card addressed to 'J. M. Zion.' He wanted to know if there was anything else, so I took off my cuff, and showed the initials inside, 'J. M. Z.' I didn't want to get into any trouble, and said I was satisfied to do anything. I said: "Are you not satisfied that I am J. M. Zion and entitled to ride on this train? Are you not absolutely positive that I am J. M. Zion?" He said: "That is good evidence. I will telegraph back and find out." "

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Nothing more was said until the train arrived at Reno, when the conductor approached plaintiff, and said: "Excuse me. I am very sorry to inform you that you will have to pay your fare, or get off the train. I don't want you to think I am acting on my own motion or judgment. I have received strict orders, and I will have to carry them out."

After further conversation the conductor took the plaintiff by the arm and took him off the train, without using any force or violence. The plaintiff was detained in Reno two days, at an expense of \$7.50. After getting his trunk, and receiving money in answer to a telegram for funds, he paid his fare to Ogden, \$29.50.

On the trial, defendant admitted that the ticket which the plaintiff had was a regular passenger ticket, which entitled him to the rights and privileges of a regular passenger upon its train between the points designated therein. It was also admitted that defendant and its agents had no right to expel plaintiff from the train, and that its act in so doing was wrong. No exceptions were taken to the charge of the court.

As to the measure of damages, the court charged the jury: "That under the pleadings and evidence in this case the plaintiff is entitled to recover as damages from the defendant the amount paid by him for the ticket from Reno to Ogden, * * * and the amount of expenses necessarily incurred by reason of the delay at Reno. * * *

Instructions.

He is also entitled to recover reasonable compensatory damages for being wrongfully and unlawfully expelled from the train at Reno. In estimating that amount you should take into consideration all the facts and circumstances in connection with his expulsion from the train, * * * whether any insults or indignities were at any time offered to him by the conductors or agents of the defendant, and all the facts and circumstances which occurred upon the train, and which led to his being expelled from the train." That exemplary, vindictive, or punitive damages could not be given. That the jury could only award such damages as would fully, fairly, and justly compensate plaintiff for the indignities or humiliation, if any, which he received, in addition to the actual expenses.

The charge of the court is in substantial accord with the universal current of decisions upon the measure of damages in such cases. The mere fact that plaintiff was wrongfully and unlawfully expelled from the train authorized the jury to find,

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independent of any other proof upon the subject, that plaintiff had suffered feelings of humiliation for which it should assess some damages; and if the expulsion is accompanied by insult, abuse, or undue violence, the jury is authorized to consider the injured feelings of the plaintiff, the indignities endured while a passenger on the train, the humiliation and wounded pride which one in his condition in life and standing in the community would naturally experience, and to award compensatory damages therefor. *Quigley v. Railroad Co.*, 11 Nev. 351, 367; *Gorman v. Southern Pac. Co.*, 97 Cal. 6; *Railway Co. v. Fix*, 88 Ind. 381, 11 Am. & Eng. R. Cas. 109; *McGinness v. Railway Co.*, 21 Mo. App. 399; *Carsten v. Railroad Co.*, 44 Minn. 454; *Railway Co. v. Chisholm*, 79 Ill. 585; *Railroad Co. v. Connell*, 127 Ill. 419; *Paddock v. Railway Co.*, 37 Fed. 841; *Du Laurans v. Railroad Co.*, 15 Minn. 49, 58 (Gil. 29); *Railway Co. v. Rice*, 38 Kan. 398, 34 Am. & Eng. R. Cas. 316; *Lucas v. Railroad Co.*, 98 Mich. 4; *Stutz v. Railway Co.*, 73 Wis. 147, 37 Am. & Eng. R. Cas. 187; *Boster v. Railway Co.*, 36 W. Va. 324; *Beach*, Ry. Law, § 891, and authorities there cited.

Under all the facts and circumstances of this case, was the jury justified in assessing the damages at \$1700? Is the amount awarded so excessive as to indicate passion, prejudice, or undue influence upon the part of the jury?

With the exception of *Bass v. Railway Co.*, 42 Wis. 654, which was a case of extreme wrong, abuse, and violence, where the sum of \$2500 was allowed to stand, under the peculiar circumstances of that case, my attention has not been called to any decided case where the appellate court has declined to interfere where the damages exceeded \$1000, in cases at all analogous to the one in hand. An examination of the decided case relative to the amount of damages rendered by juries for the wrongful expulsion of a passenger from the train for refusal to pay fare, when he has a ticket entitling him to ride, clearly shows that the verdict in this case is much greater than has been allowed to stand. Verdicts, in such cases, which have been sustained as not excessive range from \$50 to \$800. The following cases have been examined: (1) Where the judgment was less than \$500: *Railway Co. v. Howerton*, 127 Ind. 236; *Railway Co. v. McDonough*, 53 Ind. 290; *Railroad Co. v. John-*

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son, 67 Ill. 312; Railway Co. v. Wilkes, 68 Tex. 619, 34 Am. & Eng. R. Cas. 331. (2) Where the judgment was \$500: Gorman v. Southern Pac. Co., 97 Cal. 1; McGinness v. Railway Co., 21 Mo. App. 399; Railway Co. v. King, 88 Ga. 443; Du Laurans v. Railroad Co., 15 Minn. 51 (Gil. 29); Boster v. Railway Co., 36 W. Va. 319. (3) Where the judgment was over \$500, and not exceeding \$800: Railway Co. v. Myrtle, 51 Ind. 566; Railway Co. v. Fix, 88 Ind. 382, 11 Am. & Eng. R. Cas. 109; Railroad Co. v. Milligan, 50 Ind. 393; Graham v. Railroad Co., 66 Mo. 536. In the following cases judgments were held to be excessive: (1) For sums of \$500 and under: Railroad Co. v. Cunningham, 67 Ill. 316; Huntsman v. Railway Co., 20 U. C. Q. B. 24; Finch v. Railroad Co., 47 Minn. 36; McLean v. Railway Co., 50 Minn. 485. (2) For the sum of \$1000: Railroad Co. v. Parks, 18 Ill. 460; Railroad Co. v. Vanatta, 21 Ill. 188; Railroad Co. v. Peacock, 48 Ill. 257; Goins v. Railroad Co., 59 Ga. 426; Railway Co. v. Chisholm, 79 Ill. 585. (3) For sums above \$1,000: Railroad Co. v. Slusser, 19 Ohio St. 157; Railroad Co. v. Griffin, 68 Ill. 500; Doran v. Ferry Co., (City Ct. Brook.) 19 N. Y. Supp. 172; Cunningham v. Power Co., 3 Wash. St. 472; Palace-Car Co. v. Reed, 75 Ill. 125; Railroad Co. v. Weaver, 16 Kan. 456; Quigley v. Railroad Co., 11 Nev. 351.

In several of the cited cases the facts were entirely different from the case at bar. In some the plaintiff suffered no indignity or insult. In others the plaintiff was at fault, but greater force was used in expelling the plaintiff than was necessary. In a few cases the plaintiff was expelled at a place where there was no station, the conductor acting in violation of the laws of the state where such expulsion occurred. In others more or less actual violence was used. In all of these particulars the cases are not directly in point. But several of them are in many essential respects similar to the present case. In nearly all the cases where the courts declared the verdicts to be excessive a new trial was granted without any discussion as to what amount would be proper for the jury to award. In the very nature of the cases, it would be impossible to state any general rule upon the subjects, as each case would have to be decided upon its own peculiar facts and circumstances.

It is well settled, however, that the court should never in-

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terfere upon the sole ground that the verdict is greater than the court would have given. It is the province of the jury to determine the amount. In assessing the damages in cases of this character there is naturally a wide divergence of opinion among jurors. Some latitude must be allowed to the jury in fixing the amount upon a fair, just, and reasonable basis. Unless it is clearly shown, to the satisfaction of the court, that the jury, in the determination of the case, were influenced by passion, prejudice, or some improper motive, the court ought not to interfere; but where it is apparent that the jury were governed by such influences, or acted under a misapprehension of their duty or of the facts of the case, it is not only proper, but it is the duty of the court to interfere.

It is evident that the jurors in this case were not misled as to their duty in the premises. The court charged the jury to take into consideration the fact that the ticket constituted a contract between plaintiff and defendant; that by the terms of the ticket the plaintiff was required to identify himself as the original purchaser thereof, by writing his name, or by other means, when so required by the conductor or agents of the railroad; that the conductor had the right, and it was his duty, to require the plaintiff, if there were doubts as to his identity, to sign his name and make such other proof as was proper, in order to identify himself as the holder of the ticket; that they should consider whether the conductors, or either of them, exceeded their duty in this respect—whether they offered any insults or indignities, or simply made the necessary inquiries; that the conductors, in acting upon appearances, were acting at the peril of the corporation, and that if it afterwards turned out, as it did in this case, that they acted upon an erroneous impression as to the facts, then, no matter how much they were mistaken, nor how honestly they may have acted under the belief that plaintiff had not paid for his ticket, nor how little force was used in ejecting plaintiff, the act was nevertheless unlawful and wrong, and for any injury which the plaintiff received he is entitled to full compensation, and nothing more.

It was contended by defendant's counsel that no indignities, other than the mere fact of expelling plaintiff from the car, were shown by the evidence; that the remarks made by the first conductor, to the effect that it looked like the plaintiff was lying, or had forged the ticket, were provoked by the lan-

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guage and conduct of the plaintiff himself. The jury evidently did not accept this view. There was some slight conflict in the testimony, but the jury were fully justified in accepting the plaintiff's version as to what occurred.

By referring to the testimony it will be observed that the conductor was at fault. It was his duty to be courteous, polite, and civil. The plaintiff was explaining to him in a respectful manner that he was the original purchaser of the ticket; that his name was J. M. Zion;

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damage.

that his signature on the ticket was not signed in the usual manner, owing to the fact that there was but little space in the window of the office, and said to the conductor that if the ticket was given back to him he would write his name the same as it is written on the ticket, whereupon the conductor said, "No, you can't fool me that way." Here is a direct insinuation that plaintiff was not acting honestly; that he was trying to deceive the conductor; that he intended to fool him by imitating the signature. With such an insinuation it was natural for the plaintiff to reply, "Probably you think I am lying about it, or forged it," and the thought of the conductor when he told the plaintiff, "You can't fool me," found expression in the answer, "It looks like it." The language of the conductor cast reflection upon the honor and integrity of the plaintiff, and must have been so considered by the other passengers who heard all the remarks.

It is unnecessary to review the evidence as to what occurred at Colfax. As to everything that passed between the first conductor and the plaintiff it may be conceded that the plaintiff was not entirely free from blame. It is perhaps true that if the plaintiff had not become excited, and had thought of his hat-box, with his name printed thereon, and the cuffs, with his initials, and had searched his valise for letters, and had exhibited all these proofs, the conductor would have been satisfied, and no further trouble would have occurred. But the plaintiff was not to blame for becoming excited.

In *McGinness v. Railway Co.*, *supra*, the conductor, after taking the ticket from the passenger, told him that the ticket was forged or tampered with, and, if he did not alter it, somebody else did. The court said: "This was a most unmanly innuendo, wholly unwarranted by the circumstances, and grossly offensive and insulting to any gentleman of ordinary sensibility and pride." Any man of spirit would naturally be-

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come excited under such circumstances. To a man of ordinary sensibility and self-respect it is always humiliating, in the presence of others, to be arraigned by a conductor about his right of passage. The indignity is much greater when statements affecting his honor, integrity, and truthfulness are directly or impliedly made. Moreover, the first conductor was at fault in refusing to return the coupon from "Los Angeles to Ogden," thus depriving the plaintiff from making satisfactory proof of his right to travel thereon. Under the rules of law heretofore announced, the defendant is responsible for the indignities offered by its agents to plaintiff while a passenger upon its train, as well as for the act of expulsion therefrom. The acts and conduct of the two conductors cannot be segregated, as was suggested by counsel for defendant, and the act of the second conductor, who expelled plaintiff from the train, alone be considered. All damage sustained by plaintiff as the direct and natural consequence of the fault of the first conductor in refusing to give plaintiff the coupon from "Los Angeles to Ogden," or a check as evidence thereof, was a proper matter for the consideration of the jury. *Yorton v. Railway Co.*, 62 Wis. 367, 18 Am. & Eng. R. Cas. 332, 2 Sedg. Dam., § 865.

Notwithstanding the fault of the first conductor in this respect, the second conductor ought not to have put the plaintiff off, if the proofs offered to him were of such a character as to satisfy him that the plaintiff was entitled to ride. *Railway Co. v. King*, 88 Ga. 443.

But the question will remain as to whether or not the verdict for \$1700 was excessive. The jury was especially admonished by the court that the damages must be confined to a reasonable compensation, and that nothing could be added as punitive damages, by way of punishment. It is impossible to reconcile the verdict with the charge. The jury must have been actuated to some extent, at least, by a bias or prejudice against the defendant. On no other theory can the amount of the verdict be explained. While the court is disposed to allow great latitude in the assessment of damages in cases of this character, it is unwilling to give its sanction to an excessive verdict. As was said by the Supreme Court in *Railroad v. Parks*, 18 Ill. 460, "We cannot hesitate to say that the damages allowed are grossly * * * excessive. Although in a case of this kind this court will in-

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terfere with a verdict with great reluctance, yet we will not hesitate to do so where it is apparent at first blush that the jury have misapprehended the law of the case, or misunderstood the facts, or else have been influenced by their passions or their prejudices rather than the law and the facts. It is not the duty of courts to enforce the arbitrary edicts of juries, but it is their duty to firmly and fearlessly stand between the party and the jury whenever it is manifest that the party has been made a victim to their prejudices. In this class of cases great latitude should no doubt be allowed to juries in their estimate of the damages, but to this there must be a limit; and should we refuse to interfere in this case, it would be equivalent to saying to juries, in all cases of this kind, 'We will shut our eyes to the facts of the case, and let you work your will with all parties placed in your hands. Now, do with them as you please. We will not interfere.'"

Juries must be made to understand that an excessive verdict is really prejudicial to the plaintiff in the action, resulting in delays and in new trials, involving unnecessary loss of time and additional and useless expense.

In consideration of all the facts, after a thorough review of the authorities, it is ordered that the motion for a new trial be, and the same is hereby, granted, unless the plaintiff, within five days, remits the amount of damage in excess of \$850, and if the same is remitted the new trial will be denied.

HOUSTON & TEXAS CENTRAL RAILROAD CO.

v.

SMITH (Sally) *et al.*

(*Court of Civil Appeals of Texas, November 13, 1895.*)

Carrying Passenger Beyond Destination [(1) p. 184]—**Liability for Injuries Resulting Therefrom.**—Where a conductor of a railroad train agrees to allow a passenger who is traveling in the nighttime to disembark at a certain specified point, carries the passenger beyond such point, as a result of which the passenger, while attempting to find the road which led to the home of a friend nearby, fell into a ditch, and seriously injured her foot and ankle, without fault on her part, the railroad company is responsible for damages resulting from such injury. (*Page 178.*)

2 (N. S.) A. & E. R. Cas.—12

Carrying beyond Destination H. & T. C. R. Co. v. Smith

Appeal from Bastrop county district court. *Affirmed.*

Baker, Botts, Baker & Lovett, O. S. Holt and Frank Andrews, for appellant.

H. M. Garwood, for appellees.

KEY, J.—Suit by Mrs. Sallie Smith, joined *pro forma* by her husband, for damages for personal injuries. Verdict and judgment in her favor for \$2000. The plaintiffs' cause of action is based upon the proposition that a conductor on appellant's road agreed to put Mrs. Smith off a train on which she was traveling in the nighttime, at a point where a dirt road crossed the railroad track, near a spring, in the village of Bowersville, but failed to do so, and carried her beyond the agreed point, and put her off; and that, while attempting to find the road which led to the home of a friend near by, she fell into a ditch, and seriously injured her foot and ankle.

There is evidence in the record tending to support that theory; and, as it was the peculiar province of the jury to determine the credibility of witnesses, and the weight to be given to their testimony, we hold that the verdict is supported by evidence. This holding involves the further holding, as conclusions of fact, that the wrongful conduct of appellant's agent in putting the plaintiff off at a point other than that agreed upon was the proximate cause of the injury complained of; that Mrs. Smith was not guilty of contributory negligence; and that the verdict is not excessive.

Under the ruling made by this court in *Railway Co. v. Bowles*, (Tex. Civ. App. 1895) 30 S. W. 89, appellees were not barred by the orders and decrees made by the federal court in the receivership proceeding. We adhere to the ruling there made.

There are numerous assignments of error complaining of charges given, and of the action of the court in refusing requested charges. They present no new or novel questions; and, without discussing them in detail, we hold that the assignments referred to point out no reversible error. The judgment is affirmed.

Affirmed.

MISSOURI, KANSAS & TEXAS R. CO. OF TEXAS

v.

KENDRICK (William).

(Court of Civil Appeals of Texas, June 12, 1895.)

Liability of Company for Failure of Conductor to Awaken Passenger—Carrying Past Station [(1) p. 184].—A railroad company is not liable for the failure of one of its conductors to awaken a sleeping passenger in accordance with his promise to do so, whereby the passenger is carried past her station, where it appears that the usual announcement of the station was made, that the train remained there long enough for passengers to disembark, and that the passenger was let off at the next station and furnished free transportation to her destination. (Page 181.)

Liability of Company for Incivility and Discomfort to Passenger at Station.—The facts that during a wait of about 4½ hours at the station where the passenger was let off, for a train to her destination, the stationmaster was cross and gruff to her, and refused information as to the name of the town, or where she could find hotel or other accommodations, that when she asked for water a tank 100 or 200 yards distant was pointed to, and that a crowd of men and boys around the depot jeered and laughed at her, are not sufficient to justify a judgment against the company. (Page 183.)

APPEAL from Raines county district court. E. W. TERHUNE, Judge. *Reversed.*

Dillard & Muse, for appellant.

LIGHTFOOT, C. J.—This suit was brought by appellee for damages against appellant railway company, plaintiff alleging his cause of action substantially as follows: That on July 14, 1892, plaintiff sent his wife and two small children, by railway, from Oklahoma City to Emory, Tex.; that upon arrival at Gainesville, Tex., she purchased a ticket over defendant's road from Gainesville to Emory; that, after the train left Gainesville, the conductor promised appellee's wife, who had lost much sleep with a sick child, that, if she went to sleep, he would awake her at Whitesboro, where it was necessary for her to change cars; that said conductor neglected to awake her, and, in consequence of such neglect, she and her children were carried by Whitesboro, and against

Case stated.

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her protest, put off at Collinsville, where she was neglected and badly treated by appellant's local agent and a crowd of men and boys at the depot; that she remained at Collinsville several hours, and took a north-bound train for Denison, where she arrived at 6 o'clock, and was compelled to spend the night, and did not reach her destination until the next day. Plaintiff claimed actual and exemplary damages for the delay, and for physical and mental suffering, mortification, anxiety, and humiliation of his wife at the ill-treatment of defendant's servants. The defendant filed general and special denial of any agreement on the part of the conductor to awaken her at Whitesboro, or any ill-treatment or negligence on the part of the company or its servants.

There was a verdict and judgment for plaintiff, from which this appeal was taken.

The appellee has filed no brief or made any appearance in this court.

The appellant's third assignment of error is as follows:
"The court should have instructed the jury, as requested in defendant's first special instruction, to return a verdict for the defendant, because, under the evidence in the case, it was shown that plaintiff's wife, by her own negligence, was carried beyond Whitesboro, and because no agreement that she made with the conductor as to awaking her at Whitesboro would bind the defendant; and, further, the court erred in not giving the seventh special instruction requested by defendant, because, if any such agreement was made between the conductor and the wife of plaintiff that the conductor would have her awakened when the train arrived at Whitesboro, then by so doing the conductor was acting beyond his authority, and as the agent of plaintiff's wife."

There is a conflict in the evidence as to whether the conductor after leaving Gainesville promised to awaken Mrs. Kendrick at Whitesboro if she should be asleep. She testified to such promise, and the conductor denied it. There is also a conflict in the evidence as to whether she was asleep when the train reached Whitesboro. She testified that she was asleep, and relied upon the conductor's promise to awaken her, and thus passed the station where she was to take another train for Emory. The conductor and porter testified that she and her children were on the rear car, which was cut

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out of the train at Whitesboro; and the porter testified that he assisted her and the children off the train, and pointed out to her the train she was to take.

However this may be, we will assume that she did have the promise of the conductor to awaken her at Whitesboro; that he failed to do so, and she, being asleep, was carried by her station, and put off by the conductor at the next station, and given a return check to Whitesboro. The facts show that she remained for several hours at Collinsville, in the depot, with her children, and took a north-bound train, reaching Denison about 6 o'clock in the evening, where she was compelled to stay all night, and take a train the next day, when, if she had made her connection properly at Whitesboro, as she expected, she would have reached Emory the evening of the day she left Gainesville.

The first question which presents itself for our consideration is this: Was the railway company responsible for the failure of the conductor to awaken the lady at Whitesboro, she being asleep when she reached the station?

Liability of
company for
failure to see
after passen-
gers.

As a rule, it has been held by our courts that it is the duty of railway companies to establish needful and proper rules and regulations for announcing the stations along their lines of railway; and, on the other hand, that it is the duty of passengers to be ready to disembark with reasonable dispatch, so as not to delay the movement of trains, or unnecessarily impede travel or commerce.

Mr. Hutchinson, in his work on Carriers (section 617*b*), thus lays down the doctrine: "Awaking Sleeping Passengers.—So it is said that it is ordinarily no part of the carrier's duty to see that passengers are awake when the train reaches their destinations, and that the company is not bound by the conductor's promise to so awaken a passenger. Exceptional circumstances might, however, impose the duty. But in the case of sleeping-cars the rule is different. There the passenger is invited to go to sleep, and pays extra for the conveniences therefor, and, as will be seen, it is the duty of the company's servants to awaken him in time to dress and alight in safety."

In support of this proposition, Mr. Hutchinson cites the cases of *Sevier v. Railroad Co.*, 61 Miss. 8, 18 Am. & Eng. R. Cas. 245, and *Nunn v. Railroad Co.*, 71 Ga. 710. We have not access to the last-named case.

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In the case of *Sevier v. Railroad Co.*, *supra*, the conductor had promised to awaken a passenger at Jackson, which he failed to do, but put him off four miles beyond. The court said: "It was not the duty of the conductor to arouse the appellant on the arrival of the train at Jackson by any special means applicable to his condition as being sick and drowsy. The business of the conductor was to manage the train according to the established regulations, and not to vary them for an individual. Regulations are made for the traveling public, and should be reasonable as adapted to the convenience of the public. If persons sick or under any disability which renders them unable to conform to the reasonable regulations for the community generally are inconvenienced by this inability, they have no legal cause of complaint against a carrier who undertakes to carry the public generally, according to a plan adopted to suit persons generally in a condition to travel, and not designed to meet the wants of those not in such condition. The obligation of the carrier was to carry the appellant safely to Jackson, and on arrival there to announce the fact, and afford an opportunity for him to leave the car. That he was asleep, and that his sleep was induced by sickness, did not entitle him to special attention. * * * The agreement of the conductor to arouse the appellant at Jackson did not impose any obligation on the railroad company. The appellant was bound to know that the conductor had no authority to incur an obligation to that effect for the company, and that his duty was to the passengers generally, and not to him particularly. He must be held to have known the established usage of calling out the name of the station, and for the passengers to leave the car on its arrival at his destination, and that the promise of the conductor was his personal obligation, and was not the promise of the company, which he had no right to bind by an undertaking in behalf of one of many passengers to all of whom, respectively, the company owed the same duties. Whether sudden illness occurring to one on board a train after going upon it, and made known to the conductor, would create such an emergency as to impose the duty on him to give such passenger needed attention, and vary the course of dealing with passengers, is purposely left an open question, to be decided when it arises." See, also, *Railroad Co. v. Kendrick*, 40 Miss. 386, Redf. R. R. 330. This is in harmony with the rule heretofore announced by this

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court, and supported by an unbroken line of decisions in this state. *Railway Co. v. Alexander*, (Tex. Civ. App.) 30 S. W. 1113, and authorities there cited; *Railway Co. v. James*, 82 Tex. 306; *Railway Co. v. Perry*, (Tex. Civ. App.) 27 S. W. 496.

In this case, although there is a conflict in the evidence as to whether the conductor actually agreed to awake Mrs. Kendrick at Whitesboro, and whether she was actually asleep when the train arrived at that place, it is not controverted that the usual announcement of the station was made by appellant's servants when the train reached Whitesboro, and that the train remained there long enough for passengers to disembark, and that, after Mrs. Kendrick and her children were found on the train after it had passed Whitesboro several miles, they were put off at the next station, and given a return check to Whitesboro, free of charge. Under such circumstances, it certainly cannot be said that the company was liable for the failure of the conductor to awaken the lady at Whitesboro.

2. It is contended by appellant that the testimony shows no such treatment by appellant's servants at Collinsville as would authorize a recovery of damages against the company. It is not controverted that Mrs. Kendrick and her children arrived at Collinsville about 11 o'clock in the morning, and remained at the depot until about 3.30 o'clock in the evening, when they were carried on one of appellant's passenger cars, free of charge, to Whitesboro, where the connection for Denison was made. While at Collinsville the weather was pleasant, and they were permitted to remain in the depot, and were furnished with such accommodations as the depot afforded. Mrs. Kendrick claims that she was mistreated at Collinsville by the appellant's agent at the depot; that he was cross and gruff, and refused to tell her the name of the town, or where she could get an hotel or other accommodations for the sick child; that she asked for water, and was pointed to a tank 100 or 200 yards away; that a crowd of men and boys around the depot jeered and laughed at her, etc. These facts are all disputed by other witnesses, but, if undisputed, are they sufficient of themselves to support the judgment rendered in this case? We think not.

Liability for
incivility and
discomfort at
station.

The duties of a carrier of passengers require that it should furnish reasonable stational facilities for the accommodation of

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Destination****Abstracts of Recent Decisions**

travelers upon its lines, but we know of no requirement that it should furnish hotel accommodations for persons stopping for any considerable length of time. Hutch. Carr. 516. It is not required by law that the local agents of railway companies should keep the depots at small stations open at all times, when trains are not expected, nor is it provided exactly what accommodations shall be provided for passengers while waiting for transportation. There is no testimony in the record showing what was the duty of the agent at Collinsville. Common decency, as well as humanity, would always suggest that a lady with two helpless children should be treated by the agent with the utmost kindness and consideration, and anything short of this would fall short of his duty as a man. But the question is, was there any act on his part, as agent of appellant, which would authorize a recovery of damages against the railway company? If so, the record does not disclose it.

The acts complained of are not acts of commission, but acts of omission, and the omitted duties are not such as are imposed by law. The views as above expressed do not contravene the doctrine that, if the acts on the part of the men and boys who (it is claimed) laughed and jeered at her had been such as to amount to an actionable tort, the duty of the company to protect her might be such as to lay the company liable for damages for its failure (*Id.* 548-552); but no such case is presented for our consideration.

Upon the whole, we have not been able to find under the facts as presented in the record, sufficient evidence to support the conclusions of the court below.

The judgment is reversed, and the cause remanded.

ABSTRACTS OF RECENT DECISIONS

(1) **Carrying Passenger Past Station** [(1) p. 185.]—*Failure to Awake Sleeping Passenger*.—A railroad company is not liable for carrying a sleeping passenger past his station, since it is no part of the duty of operatives of train to arouse a sleeping passenger and see that he gets off the train, their duty in that regard being to stop the train at the station a reasonably sufficient time for him to get off, and to give reasonable notice of the arrival of the train at the station. *Texas & P. R. Co. v. Alexander*, (Tex. Civ. App., 1895) 30 S. W. 1113. *Citing* *Railway Co. v. James*, 82 Tex. 306; *Railway Co. v. Perry*, (Tex. Civ. App.) 27 S. W. 496; *Sevier v. Railway Co.*, 61 Miss. 8, 48 Am. Rep. 74, 18 Am. & Eng. R. Cas. 245.

Notes

Carrying beyond Destination

Same—Injury to Passenger on Car Platform Expecting to be let off Past Station—Plaintiff held a ticket for a flag station at which it was customary to slow the train, but not to stop. As the train approached the station it was announced by the train officials, and plaintiff going to the platform, finding that the station had been passed, and supposing the intention was to let him off at a short distance further on, stood on the car steps, when the train giving a sudden jerk and increasing its speed, he was thrown to the ground and sustained the injury complained of. *Held* that the case was not one where a passenger sustaining injury by jumping from a moving train which has passed his station, is precluded from recovering damages. *Brashear v. Houston Cent. A. N. R. Co.*, 47 La. Ann. 735. *Distinguishing* *Damont v. Railroad Co.*, 9 La. Ann. 441; *Walker v. Railroad Co.*, 41 La. Ann. 796, 41 Am. & Eng. R. Cas. 172; *Lehman v. Railroad Co.*, 47 La. Ann. 708; *Odom v. Railroad Co.*, 45 La. Ann. 1201.

Same—Construction of Complaint—Allegation of Negligent Operation of Train.—An allegation in a complaint for personal injuries that defendant so negligently ran a motor on the steps of which plaintiff was riding, at a high rate of speed past its usual stopping-place, that plaintiff was unable to alight, and that the car was carelessly and negligently run into a cut, the embankment of which had been so carelessly and negligently left near the track as to leave plaintiff no space to escape, so that he was caught between the steps and the bank and sustained the injuries complained of, is an allegation not only of negligence in carrying plaintiff past his station, but also of negligence in operating the train. *Denver & B. P. R. T. Co. v. Dwyer*, 20 Colo. 132.

Same—Failure to Stop at Station—Measure of Damages.—In an action *ex contractu* to recover for a failure to stop at a station for which plaintiff has purchased a ticket no punitive damages can be assessed in the absence of bad faith, and when there has been no proof of actual damages, but mere loss of time and inconvenience for the technical violation of the contract is shown, compensatory damages of a nominal amount should alone be allowed. *Judice v. Southern Pac. R. Co.*, 47 La. Ann. 255.

NOTES

(1) **Carrying Passengers beyond Destination—Liability of Carrier**.—A railroad company in accepting the ticket or fare of a passenger to a designated station on its line, is bound to stop the train on which such passenger is riding when such ticket or fare is so accepted so that such passenger may get off the cars. It is not sufficient that the speed of the train is slackened; the cars must come to a full stop and so remain a sufficient length of time to allow the passenger a reasonable opportunity to alight. *Georgia R. R. & Banking Co. v. McCurdy*, 45 Ga. 288.

Carrying beyond Destination

Notes

In an action by a female passenger against a railroad company for carrying her beyond her place of destination, there being evidence of failure to stop the train at such place, and that she was landed where no conveyance could be procured, and that she then walked in the night a distance of five miles, it is also admissible to prove that the walk occupied three hours over very dusty roads, that in crossing a creek the plaintiff got her clothing and feet wet, that she was chased by dogs, and otherwise frightened, and that the weather was hot and sultry, in consequence of which she became and remained sick for some time. *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474, 18 Am. & Eng. R. Cas. 254.

In an action by a passenger against a railroad company to recover damages for carrying him past his destination, the complaint should aver that the train on which he was so carried was one which, under the regulations of the company, should have stopped at that station. *Ohio & Miss. R. Co. v. Swartjout*, 67 Ind. 567.

Or, if such was the case, that although the train taken was not scheduled to stop at the station to which the passenger purchased his ticket, the company by a special contract had agreed to carry him to, and to deliver him at, such station on that train. *Ohio & M. R. Co. v. Hatton*, 60 Ind. 12.

(2) *Same—Measure of Damages.*—A railroad company which has violated its contract with a passenger by carrying him beyond his destination, is responsible in damages for the discomfort, inconvenience, sickness, expense and injuries shown to have been the direct, natural and proximate result of the breach of the contract. *International & G. N. Ry. Co. v. Perry*, 62 Tex. 380; *citing Brown v. Chicago, etc., R. Co.*, 54 Wis. 343, 3 Am. & Eng. R. Cas. 444; *Klein v. Jewett*, 26 N. J. Eq. 474; *Matteson v. R. Co.*, 62 Barb. (N. Y.) 364; *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466; *Spicer v. R. Co.*, 29 Wis. 580; *Weed v. R. Co.*, 17 N. Y. 363.

Where a passenger on a railroad train is carried beyond his station by the negligence of the company, but without any circumstances of aggravation, and without rendering any personal injury, the measure of recovery is compensation for the inconvenience, loss of time, labor and expense of traveling back, but not for anxiety and suspense of mind suffered in consequence of delay, nor for the effects upon health, nor the danger to which the passenger was exposed in consequence of the train being stopped at his station an insufficient length of time to enable him to alight. *Trigg v. St. Louis, R. C. & N. R. Co.*, 74 Mo. 147, 6 Am. & Eng. R. Cas. 345.

The general rule is that "pain of mind when connected with bodily injury is the subject of damage, but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult or inhumanity." *Indianapolis & R. Co. v. Birney*, 71 Ill. 391; *Hobbs v. L. & S. Ry. Co.*, Law Reports, 10 Q. B. 111; *Pullman Palace Car Co. v. Barker*, 4 Colo. 344.

Baltimore & P. R. Co. v. Swann Duty to Passengers

BALTIMORE & POTOMAC R. CO.

v.

SWANN (William T., and wife.)

(Court of Appeals of Maryland, June 18, 1895.)

Duty of Company towards Passengers—[(1) p. 211.]—**Degree of Care Required.**—Although causes beyond the control of a railroad company prevent the use of a passenger coach, it is still obliged to carry a person entitled to passage safely so far as it can by the exercise of the highest degree of care and skill consistent with the nature of the undertaking. *(Page 189.)*

Same—Same—Substitution of Baggage Car for Passenger Coach—Liability of Company.—If in such a case the company substitute a baggage car for the passenger coach, it is bound to make it reasonably safe and convenient for persons entitled to passage, and for failure to do so is liable for injuries sustained by such persons by reason of the unfitness of such a car for the intended purpose, unless it can show the utmost care and diligence on its part. *(Page 189.)*

Province of Jury as to Fulfillment of Duty by Company.—Whether or not the company fulfilled its duty in a given case in this respect is for the jury. *(Page 189.)*

Taking Passage in Baggage Car as Contributory Negligence.—A woman entitled to passage is not guilty of fault or negligence in taking passage in a baggage car, where pressing requirements constrain her to do so. *(Page 189.)*

Sufficiency of Instructions Excusing Use of Baggage Car.—Instructions requested on the part of the company, in an action to recover for injuries alleged to have been sustained because of the unfitness of a baggage car for the transportation of passengers, which sought to excuse the use of such a car, but failed to require the jury to find that the car was a safe conveyance for passengers, were properly refused. *(Page 190.)*

Sufficiency of Proof to Sustain Verdict.—Although there might be no recovery for a miscarriage alleged to have been caused by the unfitness of the car for the purpose of transporting passengers, yet proof of pain inflicted and injury sustained was sufficient to support the verdict. *(Page 191.)*

Conjecture as Basis of Verdict.—Comparison between the injuries complained of and those to which the passenger might have been liable if seated in a regular passenger coach will form no basis for a verdict. *(Page 191.)*

Propriety of Instruction Not Based on Evidence.—Requested instructions not based on evidence are properly refused. *(Page 191.)*

APPEAL from Charles county circuit court. *Affirmed.*

Argued before BRISCOE, BRYAN, MCSHERRY, FOWLER ROBERTS, and PAGE, JJ.

Bernard Carter, L. Allison Wilmer, and Samuel Cox, Jr., for appellant.

Adrian Posey and John H. Mitchell, for appellees.

Duty to Passengers**Baltimore & P. R. Co. v. Swann**

BRYAN, J.—William J. Swann and Elizabeth, his wife, brought suit against the Baltimore & Potomac Railroad Company for bodily injuries sustained by the wife. Verdict and judgment being rendered in their favor, the defendant appealed.

The female plaintiff, about midday on the 11th day of May, 1893, accompanied by her child 10 months old, traveled on the mixed train of the defendant, composed of passenger coaches and freight cars, from Pope's Creek to

Facts.

Cox's station, intending to return on the evening of the same day. She purchased a ticket at Cox's station for the purpose of taking the passenger train which would in ordinary course leave that station about 7 o'clock, P. M. The passenger coaches were "switched off" at Cox's, and only a baggage car was run from that station on that evening to Pope's Creek. She entered that car, and was conveyed to Pope's Creek.

The evidence in behalf of the plaintiffs tended to show that the accommodations were very uncomfortable, and unsuitable for travelers; and that, in the absence of all conveniences, she "was shaken up and knocked about from side to side, and slammed against the side of the car several times; and that immediately after one of these slams, when she was struck in her right side by the side of the car, she experienced a pain there, which was followed by a pain in her back."

The evidence also tended to show that the woman was pregnant, and that the injuries which she received caused a miscarriage, and that she had suffered pains in her back and side almost constantly for six months.

The evidence for the defendant tended to show that she was not thrown about or jostled. It was further testified that the cars could not be shifted at Pope's Creek without special danger, unless a drag-rope was used, and that the drag-rope used for this purpose had been broken in two on the evening of the 10th, having been before that time weakened by being run over by cars; that the conductor had telegraphed for one on the morning of the 9th, and thereafter, on reaching Baltimore, had applied at the office of the company, but that none was received until the morning of the 12th.

The female plaintiff was a laboring woman, being in the habit of washing, cooking, and working in the field. She lived about a mile and a half from Pope's Creek, and at the

time of these occurrences she had three children. She went to Cox's on a visit to the family of Thompson, a sectionhand on the railroad, who lived about half a mile from the station. There was some conflict of evidence in reference to the cause of the alleged miscarriage; the defendant's testimony supporting the theory that it was more likely to have been caused by the woman's exertions, and the excitement consequent upon them, before she entered the cars, and after she left them, than by any injuries received while traveling in them.

When the female plaintiff purchased a ticket at Cox's station, she acquired a contract right to be conveyed to Pope's Creek in one of the defendant's passenger coaches.

If we assume that causes beyond the defendant's control prevented the use of a passenger coach on that occasion, the obligation still remained to carry the passenger safely, so far as it could be done by the exercise of the highest degree of care and skill which was consistent with the nature of the undertaking. If the baggage car was as safe a vehicle of transportation for passengers as the defendant could procure by the utmost care and diligence, it fulfilled its duty in this respect.

Duty of company—Degree of care.

There is no evidence to sustain such an hypothesis, and probably it is contrary to the usual experience of travelers. And yet, as the defendant substituted it for the passenger coach which it was bound by its contract to furnish, the least which could be demanded of it would be some reasonable effort to make it safe and convenient for a passenger.

If the passenger was injured in the defendant's cars in the course of her journey, and in consequence of some fault or defect in the vehicle of transportation, the defendant is clearly liable for the injury, unless it can show the utmost care and diligence on its part; and we think that these are the proper inquiries for the jury in this case.

Same—Use of baggage car—Liability of company—Province of jury.

It cannot be alleged against the passenger as fault or negligence that she took passage in the baggage car. She had a right to be conveyed by the defendant, and she was constrained to travel in this way or not be conveyed at all. Domestic duties of the most pressing kind required that she should return that night to Pope's Creek. It would be unreasonable to hold that she had made a voluntary choice, whereby she had in this way

Contributory negligence in taking passage.

Duty to Passengers Baltimore & P. R. Co. v. Swann

renounced the right to safety and protection which she had purchased.

The court granted six prayers in behalf of the plaintiff. Exception was taken to only three of them. They are as follows: "If the jury believe from the evidence that the defendant was the owner of the railroad mentioned in the declaration, and sold the plaintiff Elizabeth a ticket entitling her to travel on said railroad, and received and accepted her as a passenger to be carried from Cox to Pope's Creek, on the line of said railroad, then defendant was bound to exercise on said trip, for plaintiff's safety, the highest degree of care and skill which was consistent with the nature of its undertaking."

(2) "If the jury believe from the evidence that the plaintiff Elizabeth Swann was injured whilst a passenger on a train of the defendant, the fact of such injury is *prima facie* evidence of negligence on the part of the defendant, throwing upon it the onus of rebutting the presumption, by showing there was no negligence on its part.

(3) "That, in order to rebut the presumption of negligence on its part, the defendant must show that the injury sustained by said plaintiff while traveling as a passenger on its train, if the jury find that she was so injured, could not have been prevented by the utmost care and diligence, not only in the running and management of the train, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers."

These prayers are taken almost *verbatim* from opinions of this court. Railroad Co. v. Worthington, 21 Md. 283; Baltimore & O. R. Co. v. State, 60 Md. 462; Hewes v. Railroad Co., 76 Md. 159.

The three prayers of the defendant which seek to excuse the failure to use a passenger car because of the want of a drag-rope, do not require the jury to find that the defendant made a diligent use of the means at its command for the purpose of enabling it to use the car.

The first prayer puts it to the jury to find that the drag-rope was broken on the evening of May the 10th, and that no other was obtained until the morning of May the 12th; but they are not by the prayer required to find that the defendant made a diligent effort to obtain the rope, or that it made

any efforts to supply other means of running the car to Pope's Creek; and none of these prayers required the jury to find that the baggage car was a safe conveyance for passengers.

The sixth and seventh prayers deny the plaintiff's right to recover if the miscarriage was caused in part by the action of the female plaintiff in making physical exertions and undergoing excitement before she entered the baggage car, and after she left it. But, even if there could be no recovery for the miscarriage, the pain inflicted and the injury sustained in the car would support a verdict, if found by the jury.

Sufficiency of proof.

The same remark will apply to the ninth prayer, which denies a recovery unless the miscarriage was caused directly and exclusively by injuries sustained on the trip on account of the negligence of the defendant.

The eighth prayer makes no reference to the question of the safety of the baggage car as a conveyance for passengers.

The tenth prayer institutes a comparison between the injuries complained of and those to which the female plaintiff would have been liable if seated in a regular passenger coach. It is altogether conjectural what she might have suffered in a regular passenger coach, and such a conjecture cannot be made a basis for the verdict of a jury. The ground of recovery is the absence of a proper degree of care and diligence on the part of the defendant, provided it is shown to the satisfaction of the jury, and not what might have occurred elsewhere.

Conjecture as basis of verdict.

The eleventh and twelfth prayers present the question of contributory negligence. There is no evidence from which any negligence on the part of the female plaintiff can be inferred, except such as tends to show that the miscarriage may have been caused in some measure by the fatigue which she underwent before she reached the cars at Cox's, and after she left them at Pope's Creek.

Propriety of instructions.

We have already stated our views on this question. But we may further say that the plaintiffs' fourth prayer, granted by the court, confines the recovery to the injuries sustained by the female plaintiff while "making said journey."

All the defendant's prayers which we have been considering were rejected by the court, and we approve of the ruling.

Judgment affirmed.

Duty to Passengers

Lewis v. Delaware & H. C. Co.

LEWIS (George V. R., as Adm'r.)

v.

PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE
AND HUDSON CANAL CO.,

(145 N. Y. 508.)

Duty of Company to Person on Train by Mistake.—That a person is by mistake on the wrong train, will not affect or change the measure of duty which the company owes to him as a passenger, or the degree of protection to which he is entitled against the negligent acts of the company or its servants. (*Page 196.*)

Death of Passenger Alighting from Moving Train by Invitation of Conductor [(2) p. 215]—**Province of Jury as to Care Exercised by Conductor.**—In an action for the death of a passenger, it appeared that deceased was, by mistake, on the wrong train, that he was told by the conductor that the train would not stop at his destination, that thereafter the train slowing up to allow the passage of a freight train, he was told by the conductor he would have to get out quick, that the train would be running faster very soon, and while alighting he in some way lost his balance, and was thrown or fell under the approaching train. *Held*, that the conduct of the conductor presented a question for the jury whether the request or direction to leave the train under the circumstances amounted to the degree of care toward the passenger which the law imposes. (*Page 197.*)

Same—Failure to Inform Passenger of Approaching Train.—If, with knowledge of the approach of the train which inflicted the injury, the conductor requested or invited the deceased to alight without informing him of the danger or guarding against it, he failed to perform that duty which the law requires. (*Page 198.*)

Contributory Negligence [(3) p. 215]—**Province of Court and Jury.**—Whether the deceased knew or ought to have known of the approach of the train was a question of fact and not of law. (*Page 198.*)

Same—Same.—Whether or not the attempt of the deceased to alight from the train, under the circumstances, was negligent, was a question of fact for the jury. (*Page 198.*)

FINCH, GRAY and HAIGHT, J. J., *dissenting*.

APPEAL from supreme court, general term, Third department. *Reversed.*

James W. Verbeck, for appellant.

Lewis E. Carr, for respondent.

Lewis v. Delaware & H. C. Co.

Duty to Passengers

O'BRIEN, J.—The plaintiff's intestate was killed in an accident on the defendant's railroad, near Central Bridge station, on the 18th of September, 1889. This action was brought upon the theory that the defendant is legally responsible for the injury which resulted in his death. On the trial, and at the close of the plaintiff's case, the learned trial judge granted a motion for a nonsuit, to which the plaintiff excepted. Case stated.

The appeal to this court presents the question whether, upon the proof given, the plaintiff was not entitled to have the case submitted to a jury. The trial court having disposed of the case as presenting only a question of law, the judgment must be upheld, if at all, upon the principle that upon no reasonable view of construction of the evidence could the action be maintained. If the proof given was of such a character as to warrant opposing inferences, or to justify different conclusions of fact in the minds of reasonable men, the case was for the jury.

On the day of the accident the deceased, who lived in Schenectady, got onto a train on the defendant's road at Cobleskill, for the purpose of reaching his home, but in order to do that by the regular route it was necessary to change cars at Quaker Street station. It appears Facts. that it was what was called a "through train," that made no stop at any station between Cobleskill and Albany, but whether the deceased knew it or not when he boarded the train does not conclusively or satisfactorily appear. Before reaching the next station, which was Central Bridge, about three miles further east, the deceased was informed by the conductor that no stop would be made at Quaker Street. After passing the Central Bridge station, and reaching a point about a thousand feet west of it, where a bridge crosses a stream, the train slowed up, and, in the language of one of the witnesses, came almost to a stop. The conductor then told the deceased that he would have to get out quick, that the train would not stop at Quaker Street, and would be running faster very soon. The deceased immediately got up from his seat, went to the rear of the car, and stepping down, had just reached the ground, when in some way he lost his balance, and was thrown under a freight train passing rapidly in the other direction, close to the train from which he had just landed. The tracks at this point, it seems, are close together,

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and the reason, apparently, for reducing the speed of the passenger train till it came almost to a stop was to enable the freight train going in the other direction to pass it.

There were two witnesses sworn who witnessed the transaction, and it will be perhaps best described in their own language. The first one was Tracy, who was evidently traveling with the deceased, and his version is as follows:

Facts continued.

“Was acquainted with Moses Lewis in his lifetime. Remember September 18, 1889. I was at Cobleskill on that day. Saw Mr. Lewis there on that day walking around the streets. Afterwards he and I took the train at Cobleskill to go to Quaker Street, and just before we got to Central Bridge the conductor came in and said, ‘Tickets,’ and Lewis handed him his mileage book. Lewis said, ‘Two to Quaker Street’; conductor said, ‘I don’t think we will stop at Quaker Street.’ He took the book, and tore out some tickets, and said, ‘I will see.’ He went on to the other end of the car, and came back, and in the meantime Lewis said, ‘You have stopped there before.’ He said, ‘I will see.’ He came back in about a minute or so, and said: ‘We will not stop at Quaker Street. You have got to get off here, and get off here quick. The train will be moving faster soon.’ We started, and walked to the rear platform. We walked there with a quick step. We walked quick. Lewis was first and got down, and took hold of the railing, and stepped off on the right hand side. As we went to the rear end of the car he turned to the right and took hold of the railing and stepped off, and about the time he stepped off the train gave a sudden jerk, and threw him against the rear end, and he seemed to whirl right around over the track, and fell in under a freight train. When he got out on the platform I did not see the freight train. It was not in sight.” In response to some direct question he further stated: “Q. As Lewis started to get off the train, describe what movements, if any, he made? A. After he had hold of the railing, when it gave the jerk, he tried to get back. And when Lewis got off the last step the freight train was not visible to me, standing on the rear platform. It was the freight train that ran over Lewis. I do not know what part of the train he fell under. I could not see. The engine of the freight train did not get by him before he finally let go. It was not by; it was just there.” This statement was not materially changed on cross-examina-

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tion, and being re-examined; he further said that there was no freight train to be seen when he started to go down the steps. "We were trying to get off on the side where the depot was. Lewis took hold of the railing and was stepping off. The train gave a jerk, and that threw him against the railing, and he seemed to hang on for a second, and fell down. This was all done in a second. Done quicker than you can tell it. When he whirled and fell down, that was the first time I saw the freight train."

The other witness, a man named Burns, a passenger on the train, thus describes what took place: "I was at the time in Cobleskill. Have heard Mr. Tracy testify as to the accident that occurred near Central Bridge. I remember that occasion. I got on that train, at Cobleskill. Was going to Albany. Got in the rear car. Sat on the north side of the car, facing the rear end. Saw the witness Tracy. He sat next to the window, facing me. Lewis sat with him. Did not know him at that time. Lewis sat on the outside facing me, in the same seat with Tracy. Q. Do you remember just before you got to Central Bridge the conductor came through? A. I think I can. Q. What happened? A. The conductor came in for his ticket, and this man, Mr. Lewis, took a ticket out of his pocket, or a book, I think it was black, and gave it to the conductor, and the conductor returned it to him again. Lewis said he wanted to get off at Quaker Street to go to Schenectady. The conductor told him to wait a minute; to wait and see, he would come back,—something like that,—and he returned the book to him, and he put the book in his pocket. The conductor went to the rear of the car. Then he came back, and touched Lewis on the shoulder, and told him he would have to get off there before they were going any faster than they were going. He got up and went to the rear of the car, and Tracy and four or five men at the rear, I could not tell exactly, and started to get off on the right. The last time the conductor came back he said to Lewis: 'It is going pretty slow now, and it will be going faster, and you had better get off now; that is all I have to say about it.' He told him it was a through train and did not stop at Quaker Street. When Lewis and Tracy got to the rear platform I was looking to the rear; looking right at them. They went off at the rear of the car. It was all done in a

Facts continued.

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minute. Somebody pulled the bell. Before that, when they got out on the platform, the train was just about going, and that is all there was of it. It was not going very fast. As they got out there it began to pull up all of a sudden. It did not stop. It went quicker. The next thing I saw, somebody came and says, 'Now you have got to stop, you have killed a man'; but I could not say who it was. Then the train stopped, and backed up, and I got off, and saw this man lying there with his legs cut off. At the time the conductor spoke to him first, when he came to take his ticket, it seemed to me that the train was just about pulling in pretty fast, but I could not tell how many miles an hour. We had not quite got then to the Central Bridge depot."

The judgment below proceeded upon the ground that this testimony was not sufficient to warrant a finding of negligence on the part of the defendant, and that it did not show affirmatively that the deceased was chargeable with contributory negligence. Whether the deceased had paid fare as a passenger to some point east of Cobleskill or not is left in some doubt by the testimony. The conductor was not sworn, or any evidence given in behalf of the defendant. If that was a material fact, it should have been passed upon by the jury, as the proof was *prima facie* sufficient for their consideration on that point. But we think it was not material.

The most that can be urged by the defendant in this respect is that the deceased was by mistake in the wrong train. But that circumstances did not affect or change the measure of duty which the defendant owed him as a passenger, or the degree of protection to which he was entitled against the negligent acts of the carrier or its servants. It is true that unless he took passage and paid fare to Albany, the next station where the train stopped, he could have been required to leave the train, but while on it the company owed him the same duty of protection against negligence as the other passengers.

One of the questions for our consideration is whether upon the evidence given the jury could have found that defendant did not perform that duty. It is not very material whether the language of the conductor to the deceased be regarded as a request, a direction, or an advice to leave the train. It might have been understood as a direction. The witnesses differ somewhat as to the words he used, and the construction

Duty of company to person on train by mistake.

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to be placed upon his language was for the jury, if that question was of any importance. The jury could have found that the deceased left the train, not of his own motion or upon his own judgment, but in obedience to the wish and suggestion of the conductor, and, but for what the conductor said to him would have remained in the car. The conductor's action must be judged by the circumstances existing at the time. He brought the train almost to a stop while approaching the bridge and the coming freight train, and it could be inferred from the general situation that this was for the purpose of allowing it to pass. The presence of this freight train was an element of danger not necessarily known to the deceased, but which was or should have been known by the conductor. It was the passage of that train at the time the deceased was alighting from the passenger car which caused his death. Had the request, direction, or invitation to get off been given at some other time or at some other place, where the only danger to be feared was that incident to getting off from a train moving at a slow rate of speed, there is no reason to believe that the deceased would have been injured. The deceased was induced to leave the train in the face of a danger which he may not have been aware of, but which must have been known to the conductor.

Death of passenger--Providence of jury as to care exercised by conductor.

It cannot be said as a matter of law upon this evidence that the deceased knew of the approaching train which caused his death, or could have seen it in time to avoid the danger. That was a proper question for the jury, but we cannot say that the deceased, in the hurry and excitement of the moment and in the suddenness of the emergency, either knew or could have known of the danger that awaited him on leaving the car, while the conductor did, or, at least, the jury could have taken that view of the evidence. Had the conductor stopped the train, and requested the deceased to get off at a place where another train was passing at the same time, without warning him of the danger, it would be for the jury to say whether the carrier had used that degree of care which the law exacts of it under such circumstances. So we think that the conduct of the defendant's conductor in this case presented a question for the jury. *Bucher v. Railroad Co.*, 98 N. Y. 128; *McIntyre v. Railroad Co.*, 37 N. Y. 287; *Weiler v. Railway Co.*, 53 Hun 372, 6 N. Y. Supp. 320; *Reid v. City of New York*, 68

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Hun 110, 22 N. Y. Supp. 623; *Id.*, 139 N. Y. 534; *Pool v. Railway Co.*, 53 Wis. 667, 3 Am. & Eng. R. Cas. 332; Whart. Neg. § 471; *Keating v. Railroad Co.*, 49 N. Y. 673.

The language of the defendant's servant, whatever its fair construction may be, was calculated and intended to put the deceased in motion, and may be regarded as the moving cause of his attempt to leave the train at the time and place that he did. The conductor, it must be presumed, knew the exact situation, the distance between the tracks which brought the trains close to each other, the presence of the coming freight train, and the other elements of danger, if any, to which the deceased would be exposed in leaving the train. If, with knowledge of the existence of a latent danger, known to him but not to the deceased, he requested or invited him to encounter this danger without informing him of it, or guarding against it, he failed to perform that duty to the passenger which the law requires. In dealing with the passenger, the conductor represented the corporation, and any omission of duty or neglect on his part may be imputed to the defendant.

Failure to inform passenger of approaching train.

Nor do we think that the evidence was of such a character as to warrant the learned trial court in deciding that the deceased was, as matter of law, guilty of negligence contributing to the injury resulting in his death. It cannot be affirmed, as a legal result of the evidence, that he was aware of the presence of the approaching freight train, or that, in the hurry and excitement of the moment, he could or ought to have seen it. The evidence on that point is not very clear, but, as it appears in the record, the question could not properly have been taken from the jury. So far as appears, the deceased had no reason to believe when he left his seat in the car that the conductor had invited him to alight from the train at a point where he was liable to encounter another, running at a high rate of speed in an opposite direction, and whether he discovered it on reaching the platform or before alighting was, upon the evidence, a question of fact.

Contributory negligence.

In this view, the only other ground upon which contributory negligence could have been predicated is the undisputed fact that the deceased attempted to alight from a train while in motion, at a low rate of speed, at the request, direction, or suggestion of the conductor. It is urged that negligence on

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the part of the deceased follows from that fact as a necessary legal inference, irrespective of what the conductor said or of the circumstances under which the passenger acted. This proposition is asserted upon the authority of the Hunter Case, which was considered in this court upon two occasions. 112 N. Y. 371, *Id.*, 126 N. Y. 18.

The deceased in that case attempted to board a moving train in the face of a situation and under circumstances attended with peculiar danger. Here the deceased attempted to alight from one without being aware, so far as appears, of the presence of the approaching train which caused his death, or any other danger except such as was involved in the act itself. The Hunter Case recognizes a manifest distinction between the case of a passenger getting on and off a moving train. In the latter case the act may be justified or excused by a necessity or what is termed a "stress" of circumstances that cannot exist in the former. It is not necessary now to point out all the reasons upon which this distinction rests, since this court has held, upon full consideration, that a passenger in attempting to alight from a moving train, under circumstances not unlike those appearing in this case, was not guilty of negligence *per se*, but that the question was one of fact for the jury. *Filer v. Railroad Co.*, 49 N. Y. 47.

The same principle was assumed or decided in some of the other cases above cited. There is no inflexible rule of law that determines the nature of the act of the deceased in attempting to alight from the train. It must be viewed in the light of the actual situation as it appeared to him, and judged by that measure of care and caution which a person of ordinary prudence is expected to observe under like circumstances. The conductor had presented to his mind the alternative of leaving the train immediately in order to reach his destination or of being carried out of his way to a distant point. There was but little time for thought or reflection, and whether, under such circumstances, the passenger made a prudent or a reckless choice was a question to be determined by the judgment of reasonable men. He had a right to assume that the conductor would not expose him to any concealed danger from a passing train. Had he been informed of that element of risk he might not have assumed it or might have guarded against it. Whether, under all these circumstances, his conduct was careless or prudent was a question which could not

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properly be determined by the court, but belonged to the jury.

The judgment must therefore be *reversed*, and a new trial *granted*, costs to abide the event.

Dissenting opinion. FINCH, J. (*dissenting*).—The plaintiff's intestate was crushed under the wheels of a freight train, and died from the effect of his injuries. The administrator sued to recover damages, but was nonsuited at the trial, and the general term have affirmed the consequent judgment. I think the decision was clearly right and beyond any reasonable criticism. The intestate boarded the defendant's train at Cobleskill, desiring to go to Schenectady. That he was no stranger to the situation is indicated by two facts. He had a mileage book of the company containing its tickets, which he would not have purchased unless in the frequent habit of passing over the road, and his remark to the conductor about the previous stopping of the same train at Quaker Street indicates his familiarity with its character and his habitual use of it. It was a through train, bound to Albany, not scheduled to stop at Quaker Street, and inviting no passengers for that station. This fact the intestate perfectly well knew, and it was his duty to have known it before he went upon the train. What he desired to do was to leave the car at Quaker Street, and go by another train direct to Schenectady, instead of following the two sides of the triangle, and traveling first to Albany, and then to Schenectady, which was the longer and more expensive route. He took the through train, hoping it would stop at Quaker Street, but without any invitation to enter based upon that possibility. He could reach his destination safely by either route, and he simply took his chances of being able to get off at the point which he preferred. He had no right to any such permission, and it is quite obvious that he knew it. The intestate was in the rear car of the train. When the conductor appeared, and asked for tickets, the intestate gave him his mileage book, saying, "Two for Quaker Street." The deceased was sitting by the side of Tracy, who was a witness for the plaintiff, and gave his testimony with a very commendable fairness and intelligence.

It is his evidence that I shall follow for an account of the accident. In answer to intestate's announcement of his pro-

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posed destination, "conductor said, 'I don't think we will stop at Quaker Street.' He took the book, and tore out some tickets, and said, 'I will see.' He went on to the other end of the car, and came back, and in the meantime Lewis said, 'You have stopped there before.' He said, 'I will see.' He came back in a minute or so, and said: 'We will not stop at Quaker Street; you have got to get off here, and get off quick, the train will be moving faster soon.'" When this conversation began the train was moving rapidly. When it ended the brakes had been applied, and it was moving very slow, but still in motion. It did not stop at all until after the accident. That is what every witness testifies to except one. He was a Presbyterian minister, sitting in a different car from deceased, and with nothing to draw his attention to the precise facts. He said: "The train nearly stopped. I don't know but it did come to a standstill." But, on cross-examination, he said: "Am not able to say whether the train came to a stop or not." The uncontradicted evidence, therefore, is that it greatly abated its speed, but was in motion when the accident happened. Tracy's account of the conversation is varied somewhat in its form by the testimony of Burns, who said: "The conductor went to the rear of the car. Then he came back, and touched Lewis on the shoulder, and told him he would have to get off there." The witness stated the conductor's language thus: "It is going pretty slow now, and it will be going faster, and you better get off now; that is all I have to say about it."

No other witnesses describe the conversation. It is not easy to misunderstand what was said. It was not a command to leave the train, nor a direction to do so, nor a statement in any manner controlling the free action or free choice of Lewis. It informed him of two facts bearing upon his convenience,—one, that the train would not stop at Quaker Street; the other that, if he chose not to go to Albany, his only opportunity was to get off at once while the train was going slow, and, if he preferred to do that, he must do it quickly, for the train would soon be going faster. Any different construction of the conductor's words would be possible only as a last resort in the technical atmosphere of a lawsuit. They simply notified Lewis of an opportunity to be availed of promptly, if at all, and left him to choose between a safe ride to Albany and the experiment.

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of leaving the train while moving slow. Lewis chose to avail himself of the opportunity, and get off of the train while its motion was slight. He made this choice, not under a stress of circumstances occasioned by the neglect or wrongful act of the company, which we have sometimes admitted as an excuse, but solely for his own convenience, and as the result of his own voluntary act. The company had in no manner created or caused the emergency which occasioned his choice.

It is probable that the train slackened its speed to enable a freight train approaching on the other track to first cross the bridge on which the two tracks were so close together that only one train could pass at a time. The proof does not show whether this was a usual or an exceptional circumstance. If usual, it would be a just inference that the conductor, knowing the place at which the brakes were applied, would infer the approach of a coming train first reaching the bridge. If, however, the express train, as is generally the case, had the right of way, and it was the ordinary duty of the freight train to wait on the other side for the express to pass, or the coming train was "belated," as the plaintiff's counsel says, though I see no such proof in the case, or if from any other cause the slackening of speed at that point was exceptional, then it will not follow that the conductor knew, or ought to have known, that the freight train was approaching. The proof permits only of a guess on that point more or less reasonable, according to the general knowledge with which one looks at it.

Returning to Tracy's account of the accident, and he is the sole and only witness who saw it and was able to describe it, it appears that he and Lewis both at once arose at the end of the conductor's statement, and came out upon the rear platform of the car. Lewis had in his left hand an umbrella and an overcoat; approached the steps leading to the side of the train, and with his right hand took hold of the iron rail fastened to the body of the car. What then occurred should be repeated in the words of the witness: "Lewis was first, and got down and took hold of the railing, and slipped off on the right-hand side. As we went to the rear end of the car, he turned to the right, and took hold of the railing, and stepped off, and, about the time he stepped off, the train gave a sudden jerk, and threw him against the rear end, and he seemed to whirl right around over the track, and fell in under a

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freight train. * * * I saw what he had hold of. He had hold of the railing that was on the end of the body of the car. I saw him step down. Saw him step off; step down on the ground. * * * When Lewis stepped down that way he had an umbrella and an overcoat in his left hand. When he stepped down I saw his feet strike the ground. His feet did strike the ground. When he stepped on the ground he had hold of the railing of this car. He did not continue to hold onto it more than a second, I think, and it was after he had fairly alighted on the ground. The sudden motion of the passenger train I spoke about was just about as he was in the act of stepping off. His feet had not struck the ground then. Then, after that he stepped down from the step, and struck on the ground with both feet fairly, and retained his hold of the railing after that. * * * I saw him spin around. That was when he was yet holding on the railing; when he was turning round. It was just after that. The jerk of the train came before that, when he was still on the steps. I could not say as to whether the jerk of the train threw him off under that train. It threw him against the rail. I saw him get on the ground with both feet. Saw him still hold on the railing with his hand. He was still upright, with his face toward the engine. I noticed that he was moving along in the same direction as the train at that time. * * * So far as I observed, when he came out on the platform Lewis did not make the slightest observation. * * * He took hold of the railing, and was stepping off, and, as he was stepping off, the train gave a jerk, and that threw him against the railing, and he seemed to hang on for a second, and fell down. This was all done in a second: done quicker than you could tell it."

That is the whole evidence of the accident and its cause. It puts an end utterly to the theory that getting off of the moving train had nothing to do with the injury, and shows that it had everything to do with it, and was its sole explanation and cause. We see Lewis at the very last moment when his hold on the train unloosened, pulled along in its direction, and spinning round with a fall. The whole thing occupied but a second. In telling it it seems longer, and the effort of the witness to analyze the sudden jerk and whirl makes it appear slower than the almost instantaneous event. That he might have seen the approaching freight train if he had looked; that he

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might have heard it if he had listened; that he took no observation whatever; that the jerk of his own train threw him off the step, and as his feet struck the ground his hold on the railing swept him from his balance,—these are facts, obvious and beyond reasonable question, and which show that the deceased, instead of being free from negligence, met his death from that cause.

We have held too often that it is a negligent act for one to get on or off a moving train to discuss the subject anew, and the only condition which we have ever allowed to make it excusable did not, as I have shown, exist in this case. That excuse, allowed so far to modify the character of the act as to permit a jury to regard it as not necessarily negligent, was first stated in *Filer v. Railroad Co.*, 49 N. Y. 47, in which it was held that where the passenger, by the wrongful act of the company, is put to an election between leaving the cars while moving slowly or losing the station where he has a right to stop, the question of negligence become, one of fact. It was not denied that alighting from a moving train was wrong or dangerous, but the decision went upon the ground that the act was not one of free agency, but was the product of coercion produced by the wrongful act of the company. In this case the election was occasioned solely by the fault of Lewis himself. He voluntarily and deliberately put himself in a position where there was but a possible chance of alighting at Quaker street, and when that chance was gone the choice between leaving the train moving slow and going safely to his destination flowed from his own fault, and was not produced by any wrongful act on the part of the company. A man cannot himself occasion the stress of circumstances under which he chooses, and then put them upon the company as an excuse for a dangerous act.

We refused, after a deliberate discussion, to extend the principle of that rule so as to destroy it, in the case of *Hunter v. Railroad Co.*, 126 N. Y. 18, 26 N. E. 958. We there held that the person injured acted as a free agent,—that is, not coerced or compelled to choose by any fault or wrongful act of the company,—and that his convenience or inconvenience was a matter of no account; and, further, that the invitation of the conductor did not alter that free agency, or put any sort of coercion upon it. The same thing is true here. I do not regard the words

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of the conductor as amounting even to an invitation. They furnished a possible alternative, having a risk about it which the passenger was free to accept or not, and left him to choose. Between these words, however regarded, and the accident lay the free agency of the passenger, not coerced by the company, and which it had not lessened, warped, or controlled by any wrongful act of its own. No responsibility for the choice rested upon it. Beyond that, we held in the Filer Case, in spite of the stress of circumstances and the invitation of the train agents, that the passenger was not absolved from prudence and care in alighting from the moving train.

We said of the then plaintiff that "if, in leaving the cars, she did not exercise the care and caution which she might and ought to have done, and was careless and negligent in her movements, or in the care of her dress, and by reason of such want of care caused or contributed to the injury, she ought not to recover." Here not only is no care or caution affirmatively shown, but the absence of it is proved. The passenger put his convenience above his safety. He knew it was risky and unsafe to alight from a moving train; that he was about to take that risk; that another track was alongside warning him of peril from that direction; that a train might pass at any moment, and increase the danger of his intended act, but, instead of exercising a care commensurate with the known danger, Lewis rushed off hastily in the face of the freight train, without making the slightest observation, when he might easily have seen it if he had looked.

It is said the conductor should have warned him. But Lewis knew everything except one, and that one he was bound to expect might occur. Possibly the conductor did know that the freight train was approaching, although there is no proof of the fact. It is equally possible that he did not know. He was inside the cars, where he could not see and might not have heard. The slowing of the train may have been a common and prescribed act before crossing, and not indicative of an approaching train having a right of way, and the train which did come out of its time, even if the conductor knew what its regular time was. If we are to guess about it, the chance of guessing right is very slender. But what the conductor may have known the passenger was bound to expect, whether warned or not, and the duty of care and prudence which he did not exercise remained.

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These views accord with those expressed in the courts below, and the judgment should be affirmed, with costs.

ANDREWS, C. J., and PECKHAM and BARTLETT, JJ., concur with O'BRIEN, J., for reversal. GRAY and HAIGHT, JJ., concur with FINCH, J., for affirmance.

CHICAGO, KANSAS & WESTERN R. CO.

v.

FRAZER (Susanna).

(Supreme Court of Kansas, July 6, 1895.)

Reception of Persons as Passengers by Conductor of Construction Train—Duty to Such Persons.—As the conductor in charge of a construction train is the representative of the railroad company, and the manager of the train, his action in receiving passengers upon such train and collecting fare from them, ordinarily entitles them to the rights of passengers, and to such care and attention as can be reasonably given to them upon such a train. (*Page 209.*)

Same—Unauthorized Action of Conductor—Responsibility of Company.—The fact that the conductor may have carried passengers without authority from the company, and contrary to instructions given him, will not relieve the company from liability for the failure to exercise due care towards those so received as passengers, unless they knew they were riding in violation of the rules of the company, and had wilfully joined with the conductor in committing a wrong against the company. (*Page 209.*)

Same—Carriage of Passenger to Destination—Failure to Leave Train within Reasonable Time—Termination of Right as Passenger.—Where the railroad company is engaged in the construction of a railroad, and a person is received as a passenger by the conductor of a construction train, to be carried over the newly-built portion of the road, and which had not yet been opened for public traffic, and where such person has been safely carried to his destination, and to a point which was then the end of the railroad, and had been afforded almost half an hour to leave the train, the company no longer owed him any duty as a passenger, nor was it under any obligation to him as such. (*Page 209.*)

Same—Duty of Company [(1) p. 184.]—Instruction.—Where it is not claimed that there was any omission of duty towards such person until after he had reached his destination, nor until after his right as a passenger had terminated, an instruction by the court upon the duty of the company towards passengers, holding it to be the use of the utmost care and skill within the scope of human foresight, and liable for the slightest negligence on the part of its servants and agents, is misleading and erroneous. (*Page 209.*)

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Right of Passenger on Partially Constructed Road—Knowledge of Passenger—Absence of Station Facilities—Liability of Company.—Where a person takes passage upon a construction train to run over an unfinished railroad, and is aware of its incomplete condition, and that the track had just been laid to the point of destination, and there had not been sufficient time to build a depot or to provide station facilities at that point, the company does not owe him the duty to have a suitable depot and platform at the end of the line, and the absence of the same cannot be regarded as negligence towards him. (*Page 211.*)

Sufficiency of Findings.—The testimony examined, and *held* to be insufficient to sustain some of the special findings returned by the jury. (*Page 211.*)

ERROR to Scott county district court. *Reversed.*

A. A. Hurd and *J. G. Egan*, for plaintiff in error.

Travis Morse and *E. E. Hubbell*, for defendant in error.

JOHNSTON, J.—Susanna Frazer brought an action against the Chicago, Kansas & Western Railroad Company to recover for the death of her son, J. H. Frazer, who, she alleges, was killed while a passenger on a railroad train of the defendant, by reason of the company and its servants running their train in a careless, reckless, and wanton manner, and with gross negligence, into an obstruction which was upon the railroad track. **Facts.**

On July 13, 1887, the Chicago, Kansas & Western Railroad was in process of construction, and had been completed from Great Bend to Dighton. Construction work was going on beyond Dighton, and the railroad track was then laid as far west as Scott City, but the road had not been opened by the company for either freight or passenger business beyond Dighton. The only trains in operation from Dighton to Scott City were construction trains, used for carrying employes and material, and those in charge of these trains were directed not to receive or carry any passengers upon them. Notwithstanding this direction, those in charge of the construction trains sometimes received passengers and collected fares, but the money so received was never accounted for nor paid to the company.

On the evening of July 13, 1887, J. H. Frazer boarded what is called the swing or construction train, loaded with material, at Dighton. He rode in a caboose which was attached to the train, and which was occupied by employes and a few passengers. He was aware of the fact that the road was unfinished and under construction, and he was aware

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that the company was not operating passenger trains on that part of the track, and that the railroad was not open for business further west than Dighton. About five or six days before, track had been laid as far as Scott City, but no depot had been built, nor any station conveniences provided.

The Missouri Pacific Railway Company was then building a branch road through that section of the state, and it crossed the Chicago, Kansas & Western Railroad at Scott City. On the evening of July 13, 1887, a permanent crossing had not been built, but, instead, temporary provision was made for crossing on the top of the rails of the Chicago, Kansas & Western Railroad, and this temporary crossing was in charge of the Missouri Pacific employes. The construction train on which Frazer rode that evening reached Scott City after dark. It was run past the point of intersection with the Missouri Pacific Railway, up to a temporary stopping-place on the outskirts of Scott City, where the train was met by a bus and a dray for the transfer of passengers and baggage to other parts of the town. The train remained at this stopping-place for 25 minutes, and most, if not all, of the passengers and employes left the train.

It appears that Frazer did not ride up town on the first trip, because there was not room for him and his trunk upon the bus, and parties who were present heard the bus man agree to return for him. One of the trainmen, after examining the caboose to see whether all had left there, and finding it empty, as he said, locked the same. A different crew of men then took charge of the construction train, and started to back it down to the other side of the Missouri Pacific crossing, which appears to have been about three-quarters of a mile east of Scott City.

It appears that after the construction train had first passed the intersection with the Missouri Pacific, the temporary crossing had been laid down for a Missouri Pacific train, and left there, and the construction train, which was being backed at the rate of about seven miles an hour, ran into the crossing and wrecked the train. The caboose and several other of the cars were thrown from the track, and Frazer was found dead a short distance from the wreck of the caboose.

His mother, who is the next of kin, brought this action, and at the end of the trial the jury found against the company, and awarded damages to her in the sum of \$5000.

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From the testimony, it appears that the conductor, in opposition to his instructions, sometimes carried passengers upon the construction train; and in answer to a special question the jury found that Frazer paid the conductor for his ride from Dighton to Scott City. As the conductor is the representative of the company, and the manager of the train, his action in receiving passengers upon a construction train of the company, and collecting fare from them, would ordinarily entitle them to the rights of passengers, and to such care and attention as can reasonably be given them upon such a train.

Right of conductor of construction train to receive passengers.

The fact that the conductor may have carried passengers without authority from the company, and contrary to the instructions given him, will not relieve the company from liability for the failure to exercise due care towards those so received as passengers, unless they knew they were riding in violation of the rules of the company, and had wilfully joined with the conductor in committing a wrong against the company. Where a person is received as a passenger, and pays his fare to one in charge of the train, and with apparent authority, without knowledge of any limitation of his authority, such person is justified in assuming that the company occupied the position of a carrier, and would exercise towards him such vigilance and care as the circumstances would permit. The failure of those in charge of the train to exercise that degree of care renders the company liable for resulting injuries to such persons so long as the relation of passenger and carrier exists.

Liability of company.

In this case, however, that relation only existed between the company and Frazer until the construction train reached Scott City. When he had been safely carried to his destination, and to a point which was then the end of the road, and had been afforded almost half an hour to leave the train, the company no longer owed him any duty as a passenger, nor was it under any obligation to him as such.

Failure of passenger to leave train within reasonable time—Termination of company's duty

It is not claimed that there was any omission of duty towards him until after he reached his destination, nor until his rights as a passenger had terminated; and yet the court charged the jury at length upon the duty of the company towards passengers, and held it to the use of the utmost care and skill within the scope of human foresight and

Instruction.

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human knowledge in the operation of its railroad, and liable for the slightest negligence on the part of its servants and agents. In view of the testimony in the case, instructions of this character were unwarranted, and were probably misleading. After the train had arrived, and abundant time had been given him to leave it, he could not be regarded as a passenger, nor entitled to the extraordinary care that is due to passengers. Although it was not necessary, the men in charge of the train examined to see if all had left the train, and finding no one upon it, the caboose was closed and locked for the night; and, although the jury found that the brakeman who made the examination knew that Frazer remained on the train, we can discover no testimony to support that finding. He was undoubtedly upon the train when the accident occurred, but on what part of the train he may have been is not shown; and the finding of the jury is that immediately prior to the wreck he was "in or about the caboose."

Frazer was probably on some part of the construction train when the new crew of men took charge of the same to back it over the crossing, but there is no testimony whatever that any of them knew of his presence on the train, and the jury so found. In the absence of knowledge to the contrary, those men had a right to suppose that all passengers had left the train long before that time; and if he was upon the train without their knowledge it is difficult to find that they were guilty of any negligence towards him. If he was a mere trespasser, the company owed him no duty except that it should not wantonly or wilfully injure him; but such negligence cannot be attributed to the company, unless they knew of his presence upon the train. Under the circumstances, we think the instruction was misleading and erroneous. *Railroad Co. v. Wheeler*, 35 Kan. 185, 26 Am. & Eng. R. Cas. 173; *Railroad Co. v. Berry*, 53 Kan. 112. See, also, *Davis v. Railway Co.*, 18 Wis. 185; *Imhoff v. Railway Co.*, 20 Wis. 362; *Jenkins v. Railway Co.*, 41 Wis. 112; *Hurt v. Railway Co.*, 94 Mo. 255, 34 Am. & Eng. R. Cas. 422; *Railroad Co. v. Slatton*, 54 Ill. 133; *Railway Co. v. Brooks*, 81 Ill. 245.

The error of the court was emphasized by another instruction that it was the duty of the company to provide a suitable depot and platform for the accommodation of passengers boarding and alighting from their trains, and any failure on the part of the defendant to provide such depot and platform if carrying

passengers would be negligence on the part of the defendant. The fact that the road was unfinished was obvious to every one, and Frazer was undoubtedly aware of its condition when he took passage upon the construction train at Dighton. The track had just been laid into Scott City, and there had not been sufficient time to build a depot or provide station facilities at that point. Having knowledge of the incomplete condition of the road, the company did not owe him the duty to have a suitable depot and platform at Scott City, and the absence of the same cannot be regarded as negligence towards him.

Passenger on
partially con-
structed road
—Absence of
station facili-
ties.

The finding that the deceased was on the train with the consent and knowledge of the brakeman Markell is not supported by the testimony, and it is difficult to find evidence to sustain some other of the special findings returned by the jury.

For the errors mentioned, *the judgment will be reversed, and the cause remanded* for a new trial.

All the justices concurring.

ABSTRACTS OF RECENT DECISIONS

(1) **Duty of Railway Companies Towards Passengers** [(1) p. 213].—It is the duty of a railway company to carry its passengers safely to their destination, stop a sufficient length of time to allow them to leave the train in safety, and provide a suitable place for their so doing. *Daniels v. Western & A. R. Co.*, (Ga. 1895) 22 S. E. Rep. 956.

Degree of Care Required.—The limitation of the degree of care and diligence to be used by a railway company in the transportation of its passengers is that used by a prudent man in like or similar business, having regard to the means or mode of transportation adopted. *Louisville R. Co v. Park*, (Ky. 1895) 29 S. W. Rep. 455.

Same.—The care due from a carrier to a passenger is that high degree of care that a very prudent person would use, under the same circumstances, about the same matter. *Texas & P. R. Co. v. Orr*, (Tex. Civ. App. 1895) 31 S. W. Rep. 696; *citing* *Railway Co. v. Halloran*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343; *Railway Co. v. Welch*, 86 Tex. 203.

Same.—An instruction is proper which informs the jury that railroad companies as common carriers are required to do all that human skill and foresight can reasonably do under the circumstances to prevent injuries to passengers. *Chicago & Alton R. Co. v. Byrum*, 153 Ill. 131.

Duty to Passengers**Abstracts of Recent Decisions**

Duty to Passenger on Freight Train.—The law does not exact from railroad companies all the care and diligence which the human mind may possibly conceive, nor such as will render the transportation of passengers free from all peril, but it does require everything necessary to the security of the passenger, whether upon freight or passenger trains, and reasonably consistent with the business of the carrier, and the means and conveniences employed, and this rule applies irrespective of any distinction made by the company in the character of its trains, but under it a passenger who accepts and takes passage upon a freight train acquiesces in all the usual incidents of a freight train, managed by prudent and competent men. *Delaware, L. & W. R. Co. v. Ashley*, (U. S. Cir. Ct. App. 3 Cir.) 67 Fed. Rep. 209.

Duty of Street-railway Companies.—The same liability of carriers applies to transportation by city railways as by ordinary steam travel. *Louisville R. Co. v. Park*, (Ky. 1895) 29 S. W. Rep. 455.

When Duty Ends.—The duty of a street-railway company to a passenger on one of its cars is not ended until the passenger is safely off and clear of the car. *Louisville R. Co. v. Park*, (Ky. 1895) 29 S. W. Rep. 455.

Duty as to Steps of Street-car—Accumulation of Mud—Instructions.—In an action to recover for injuries alleged to have been sustained by an accumulation of mud upon the steps of a street-car an instruction that the railway was only bound to use such diligence in keeping its steps clear of mud as ordinarily prudent persons use, etc., is properly refused because lowering the standard of diligence required of railway companies. *Louisville & R. Co. v. Park*, (Ky. 1895) 29 S. W. Rep. 455.

Injury to Person on Train by Invitation of Company—Liability of Company.—One holding a free pass and on a special car by invitation of the company is lawfully on the train, and for any injury sustained by him by reason of the negligence of the company or its servants, the company is liable. *Thompson v. Yazoo & M. V. R. Co.*, 47 La. Ann. 1107.

Release of Liability on Part of Connecting Line by Person Traveling with Live Freight.—A bill of lading for a carload of live freight stipulated that plaintiff should go with the freight to its destination via another line free, and the waybill contained a similar condition. The other company, on whose road the injury complained of occurred, allowed plaintiff to ride free, but required him to release the company from claims for injuries which he might receive while traveling on its line. *Held*, that as plaintiff was a passenger, and his release to the initial company would have been void, the release given to the connecting company, being without a new consideration, could have no greater weight. *Delaware, L. & W. R. Co. v. Ashley*, (U. S. Cir. Ct. App. 3 Cir.) 67 Fed. Rep. 209.

Limitation of Liability—Injury on Connecting Line.—A railway company may limit its liability to its own line, and is not liable for injury done on another line of road between which and itself no

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partnership exists. *Texas & P. R. Co. v. Hawkins*, (Tex. Civ. App. 1895) 30 S. W. Rep. 1113; *citing McCarn v. Allen*, 7 Tex. Civ. App. 214.

Ejection of Passenger Unable to Care for Himself—Exposure to Peril.—The law will not justify a conductor in putting off a passenger at a time and place, and under conditions and circumstances, which would expose him unnecessarily to great peril of life or bodily harm; and this, too, whether the danger arose from the natural infirmity of the person, or was self-imposed. *Johnson v. Louisville & N. R. Co.*, (Ala. 1894) 16 So. Rep. 76.

NOTES

(1) Duty of Railroad Companies Towards Passengers—Obligation to Furnish Safe Transit—Degree of Care.—Common carriers of passengers are bound to the exercise of the utmost care and diligence of very cautious persons, and are responsible for any, even the smallest, negligence. *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304.

They are only liable for negligence, and are not insurers of the safety of their passengers, although, as stated, they are required to exercise the highest degree of care, and are responsible for the slightest neglect. *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228.

Or, as it was put in *Central R. & Banking Co. v. Perry*, 58 Ga. 461: In the duties of a carrier of passengers towards its passengers which directly involve their safety, such a carrier is bound to extraordinary diligence, and in those matters touching merely the convenience or accommodation of passengers it is bound to ordinary diligence.

Therefore it has been said that when a railroad company has provided a passenger with a safe and secure seat, in the absence of accident to the train, and in a safe and convenient car, well conducted and skillfully managed, its duty towards its passengers has been performed. *Pittsburgh & C. R. Co. v. McClurg*, 56 Pa. St. 294.

But railroad companies are required to use the utmost sagacity and foresight in the construction of their roads to prevent accidents to passengers. *Union Pacific R. Co. v. Hand*, 7 Kan. 380.

And it has been rightly held that carriers of passengers for hire are bound to exercise diligence and care in maintaining order, and in guarding those they transport, against violence from whatever source arising, which might be reasonably anticipated or naturally expected to occur in view of all the circumstances, and of the number and character of the persons on board. *Flint v. Norwich & N. Y. T. Co.*, 34 Conn. 554.

Where a passenger is well known to be subject to epileptic fits, or to be insane or otherwise enfeebled, more care and attention would be required of the carrier than in ordinary cases; but the carrier must know the condition of the passenger and that extra care was

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necessary, and his duty. *Pittsburgh & C. R. Co. v. McClurg*, 56 Pa. St. 294.

A railroad company, when it has taken the fare of a passenger to a particular station on its road, is bound to stop at that station that he may get off the cars. It is not sufficient that the speed of the cars is slackened. And if, after passing the station, the speed of the cars is again slackened that the passenger may get off, and, under the direction of the conductor he does get off, and in so doing becomes injured, the company is liable. *Georgia R. R. & Banking Co. v. McCurdy*, 45 Ga. 288.

A railroad company is not legally responsible for the action of persons not its servants in falsely announcing the arrival of a train at a station, whereby a passenger in attempting to alight from the train is injured. *Columbus & I. C. R. Co. v. Farrell*, 31 Ind. 408.

A passenger in a railroad car need only show that he has received an injury to make a *prima facie* case against the carrier. The carrier must rebut the presumption of negligence arising therefrom in order to be exonerated. *Galena & C. U. R. Co. v. Yarwood*, 17 Ill. 509, *affirming s. c.*, 15 Ill. 468.

(2) **Elements and Measure of Damages for Injuries to Passengers.**—In actions against passenger carriers for personal injury to passengers occasioned by their negligence, the rule of damages is based upon the idea of compensation and not of punishment. Therefore, the only damages that can be recovered in such an action are strictly compensatory, including damages for bodily pain, and, so much only mental suffering as may be indivisibly connected therewith. *Johnson v. Wells-Fargo Exp. Co.*, 6 Nev. 224. See also *Mil. & Mis. R. Co. v. Finney*, 10 Wis. 388; *Weed v. Pan R. Co.*, 17 N. Y. 362; *Southwick v. Estes*, 7 Cush. (Mass.) 385; *Pennsylvania R. Co. v. Derby*, 14 How. (U. S.) 486; *Wells v. New York Central R. Co.*, 24 N. Y. 283.

Damages may include a reasonable compensation for suffering, expense of medical attendance and loss of time from confinement, but unless the injury has been wantonly inflicted, the damages must be strictly compensatory. *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339.

Damages for injuries arising from the negligence of a railroad company must cover present loss and that which may arise from future incapacity; they must also embrace compensation for pain and suffering. *Klein v. Jewett*, 26 N. J. Eq., 474.

A party suing for an injury received, can only recover such damages as flow therefrom and are the result thereof. Damages produced by other agencies than those causing the injury, or even by agencies remotely connected with those causing the injury, cannot be regarded as proximate or proper compensation. *Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill. 391.

In an action for an injury to the person of a passenger the circumstances, condition in life and pursuits of the plaintiff may

properly be given in evidence in order to enable the jury to determine the extent of his actual damages; and for the same reason, an inquiry into the probable consequences of the injury, as to whether they are transitory or permanent, is eminently proper. *Caldwell v. Murphy*, 1 Duer. (N. Y.) 233, *affirmed* in 11 N. Y. 416.

In an action against a carrier of passengers for personal injuries to a passenger caused by negligence, the character of the plaintiff cannot be considered as an element of calculation in estimating the amount of damages, and an instruction submitting character to the jury for such purpose is erroneous. *Johnson v. Wells-Fargo Exp. Co.*, 6 Nev. 224.

In an action against a railroad company for personal injuries received, the plaintiff cannot recover for damages which might have been avoided by the use of reasonable and ordinary diligence in effecting a cure; the use of slight care and diligence would not be sufficient. *Allender v. Chicago, R. I. & P. Co.* 37 Iowa, 264.

The fact that the salary of one sustaining physical injuries through the negligence of another is continued by his employer during the time he is disabled by reason of such injuries, cannot mitigate the damages that the injured person may recover in an action therefor. *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317.

In actions sounding in damages, where the law furnishes no legal rule of measurement save the discretion of the jury upon the evidence before them, courts will not disturb a verdict upon the ground of excessive damages, unless they be so flagrantly improper as to evince passion, prejudice, or corruption in the jury. *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660.

But where the amount of damages assessed in a verdict shows that the jury was influenced by passion and prejudice, it is the duty of the court to order a new trial of the case. *Union Pacific R. Co. v. Hand*, 7 Kan. 380.

In an action to recover damages for injury to the person, plaintiff is not bound to prove at the trial every specific injury alleged in the complaint. *Hammond v. Northeastern R. Co.*, 6 S. Car. 130.

(2) As to injuries resulting from disembarking from train at invitation or direction of employes. See *McPeak v. Missouri Pac R. Co.*, and *Atchison, T. & S. F. R. Co. v. Hughes*, *post*, notes.

(3) Upon the question of contributory negligence of passengers, see *Scheiber v. Chicago, St. Paul, M. & O. R. Co.*, and *McDonald v. Boston & M. R. Co.*, *post*, and notes.

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sengers

East Tenn., Va. & Ga. R. Co. v. Miller

EAST TENNESSEE, VIRGINIA AND GEORGIA R. CO.

v.

MILLER (C. H.)*(Supreme Court of Georgia, April 8, 1895.)*

Negligence of Company [(2) p. 220]—Presumption of Negligence Raised by Injury to Passenger [(1) p. 219]—Rebuttal by Proof of Due Care.—As railroad companies are bound to exercise extraordinary care and diligence for the safety of passengers, the presumption of negligence which the law raises in favor of a passenger in case of injury will not be rebutted by the company's showing the exercise of only ordinary care and diligence. (*Page 217.*)

Measure of Duty [(1) p. 211]—Instructions as to.—The "extraordinary" diligence due by railroad companies to passengers is "that extreme care and caution which very prudent and thoughtful persons" exercise under like circumstances; and it was error to charge, without qualification, that such companies "are required by law to observe the utmost care and diligence" for the safe carriage of passengers, and for their delivery at destination. Even if the word "utmost" is synonymous with the word "extreme," the omission from this charge of any reference to the standard of diligence observed by "very prudent and thoughtful persons" rendered it too strong a statement of the law against the company. (*Page 218.*)

ERROR to Floyd county superior court. *Reversed.*

McCutcheon & Shumate and *Hoskinson & Harris*, for plaintiff in error.

Fouché & Fouché, *H. M. Wright*, and *M. R. Wright*, for defendant in error.

LUMPKIN, J.—1. Under section 2067 of the Code, carriers of passengers are required to exercise extraordinary care and diligence to protect the lives and persons of their passengers, and are not liable for personal injuries after having used such diligence. Under this section there certainly can be no doubt that, if a railroad company fails to exercise this degree of diligence for the safety of its passengers, it will be liable for injuries occasioned, because of such failure, to a passenger

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who himself exercised the proper care for his own protection.

Section 3033 of the Code makes a railway company liable for any damage done to persons, stock, or other property, by the running of its locomotives, cars, or other machinery, unless the company shall make it appear that its agents have exercised all ordinary and reasonable care and diligence, and further provides that the presumption in all cases shall be against the company.

In the present case the court, after instructing the jury that this presumption was raised by law against the company, charged, in substance, that it might defend by showing it had exercised all ordinary and reason-
Rebuttal of
presumption
of negligence.
able care to prevent the injury, and added, "I charge you that that means, in case of a passenger, extraordinary care," etc. It was insisted that this was error, because, even in case of injury to a passenger, the company could rebut the legal presumption of negligence by showing only that it exercised ordinary care and diligence. We do not think this contention is well founded. It has been frequently held by this court that a passenger injured by a railroad company was entitled to the benefit of the presumption of negligence raised by this section; and, after considerable deliberation, we have reached the conclusion that, in arriving at what the company should do in such cases to rebut this presumption, this section should be read and construed *in pari materia* with the section first above cited. It will be observed that it is incumbent upon the company to make it appear, not only that its agents have exercised all ordinary care and diligence, but also all reasonable care and diligence.

The question therefore arises, what is "reasonable" care with reference to the safety of passengers? The obvious answer is, "extraordinary" care; for this is the plain and unequivocal meaning of section 2067 of the Code, which applies to all carriers of passengers, and uses the emphatic language that they are bound to extraordinary diligence to protect the lives and persons of passengers. When, therefore, a passenger is injured, and the legal presumption arises in his favor, the company fails entirely to rebut that presumption unless it shows that it used extraordinary diligence, —this, and nothing short of it, being, in such a case, the "reasonable" diligence required by law.

2. In enumerating the several degrees of care to be ex-

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pected of bailees, according to the nature of the particular bailment, the Code, in section 2062, defines "extraordinary diligence" to be "that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property." Applying this definition to the terms "extraordinary diligence," as used in section 2067 of the Code, the diligence to be expected of railroad companies in caring for their passengers would be "that extreme care and caution which very prudent and thoughtful persons" would observe in discharging that duty, if devolving upon them.

The court charged that railroad companies were required by law "to observe the utmost care and diligence" for the safe carriage and delivery of their passengers. Exception was taken to the unqualified use of the word "utmost" in this connection, and we think the exception well taken. To the mind of the writer, the term just quoted conveys a stronger and more significant meaning than the word "extreme." This view, however, may not be sound; for there is much reason for holding that, according to the recognized authorities, these two words are synonymous. The mere substitution, therefore, of the word "utmost" for the word "extreme" would not, perhaps, render the charge erroneous. Its real vice consists in laying down the doctrine that a railroad company is bound to use the highest possible degree of diligence in caring for the safety of its passengers; this being the real meaning of the words "utmost diligence" when used alone, and without qualification, whereas, the legal measure of extraordinary diligence recognized by our Code is, as above shown, only that extreme care and caution which very prudent and thoughtful persons exercise under like circumstances.

In giving to the jury the standard of diligence by which the company was to be bound, the court should have used the language prescribed by law for this purpose, and, in failing to do so, made too strong a statement of the law against the company. The jury were authorized to infer that the company must, to protect itself, have shown that it exercised that degree of care which would have been observed by the most prudent and thoughtful persons in the world, whereas it was enough for the company to show that it did all that, under the circumstances, would have been done by

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very prudent and thoughtful persons. This distinction is not hypercritical, for a little reflection will suffice to show that there is a substantial difference between the highest possible degree of human foresight and care and that degree of diligence which is actually observed by even very prudent and thoughtful persons, especially under the stress of sudden emergency. It was in overlooking this difference that the error in the charge complained of consisted.

As, at best, it is extremely doubtful whether the plaintiff is entitled to recover at all in this case, we do not hesitate to order a new trial because of this error, which must have operated very prejudicially against the defendant.

Judgment reversed.

ATKINSON, J., not presiding.

ABSTRACTS OF RECENT DECISIONS

(1) **Presumption Arising from Fact of Accident** [(1) p. 226].—**Burden to Rebut Presumption.**—Where a passenger is injured by an accident such as the derailment of a train at a place where the track and train are entirely under the control of the company,—that is to say, where they are not interfered with by any extraneous force,—a presumption of negligence arises, and that, in order for the company to exonerate itself from liability for the injury, it must adduce evidence to show that the accident could not have been avoided by the exercise of the utmost care and foresight reasonably compatible with a prosecution of its business. *Mexican Cent. R. Co. v. Laurecilla*, 87 Tex. 277; *citing Dawson v. Railway Co.*, 7 Hurl. & N. 1037; *Carpue v. Railway Co.*, 5 Adol. & E. (N. S.) 747; *Feital v. Railroad Co.*, 109 Mass. 398; *Curtis v. Railroad Co.*, 18 N. Y. 534; *Edgerton v. Railroad Co.*, 39 N. Y. 227; *George v. Railroad Co.*, 34 Ark. 613; *Railway Co. v. Williams*, 74 Ind. 462; *Tuttle v. Railway Co.*, 48 Iowa, 236; *Railway Co. v. George*, 19 Ill. 510.

Same.—The mere fact of an accident raises a presumption of negligence, and casts upon the defendant the burden of showing how and why the accident occurred, and that it was one which could not have been guarded against by the use of the utmost skill, diligence, and foresight. *Perry v. Malarin*, 107 Cal. 363.

Same.—Where a passenger is injured by the derailment of a car, the law presumes negligence on the part of the company, and the burden is on it to overcome the presumption. *Dampman v. Pennsylvania R. Co.*, 166 Pa. St. 520.

Same—Nebraska Statute.—It is sufficient, under the provisions of section 3, Art. 1, ch. 72, Comp. St., in an action to recover for inju-

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ries received by the plaintiff while a passenger on a railroad train in this state, to prove that such injuries resulted from the operation and management of the road. The law infers negligence from the fact of the injury, and imposes upon the railroad company the burden of proving that the case is within one of the exceptions mentioned in the statute. *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448.

Same—Act of God.—The question as to how far the mere fact that an accident has occurred raises a presumption of negligence on the part of the carrier which caused the injury, in the case of a passenger, will not be discussed where it is conceded by the plaintiff below that the accident was caused by the act of God. *Norfolk & W. R. Co. v. Marshall's*, 90 Va. 836; *citing* *Curtis v. Railroad Co.*, 18 N. Y. 534; and the General Doctrine, pp. 197, 212, *Thomp. Carr.*; *Railroad Co. v. Reeves*, 10 Wall. 176; *Gillespie v. Railroad Co.*, 6 Mo. App. 554; *Long v. Railroad Co.*, 147 Pa. St. 343; *Transportation Co. v. Downer*, 11 Wall. 130; *Ingalls v. Bills*, 9 Met. (Mass.) 43 Am. Dec. 363.

Same—Rebuttal by Preponderance of Evidence.—Although the derailment of a train may have been sufficient to raise the presumption of negligence, yet it does not devolve upon the defendant the duty of showing by evidence of a preponderating weight that the accident was not the result of its negligence. *Michigan Cent. R. Co. v. Lauricella*, 87 Tex. 277.

Same—Necessity of Proving Cause or Nature of Accident.—A presumption of negligence does not follow the simple and unexplained fact of an accident, but the cause or at least the nature of the accident resulting in the injury must be shown, for it is upon the character or nature of the accident that a presumption of negligence must rest. *Saunders v. Chicago & N. W. R. Co.*, (So. Dak. 1894) 60 N. W. Rep. 148.

Same.—Where, in an action against a railroad company for injuries, the plaintiff simply proves that, while standing at the open door of the coach in which he was riding, "there was a fearful shock," resulting in his fall and injury, with nothing to show or even suggest the cause or nature of the shock, or whether it involved the train or the car in which he was, or was simply personal to himself, there is no evidence of defendant's negligence, and the trial court rightly directed a verdict in its favor. *Saunders v. Chicago & N. W. R. Co.*, (So. Dak. 1894) 60 S. W. Rep. 148.

Same—Same—Passenger Forced from Crowded Street-car.—Where an injury results to a passenger on a crowded car by falling or being pushed off the platform of a crowded car, the burden of proof is upon him to show that his injury was wholly the result of defendant's negligence. *Dennis v. Pittsburgh & C. S. R. Co.*, 165 Pa. St. 624.

(2) **Negligence on Part of Company** [(2) p. 228].—**Failure to Keep Lookout—Animal on Track.**—Failure to keep a proper lookout on a

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train so as to discover an animal on the track in time to avert danger, constitutes negligence on the part of the company. *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277.

Same—Failure to Remove from Track Animal Injured by Train.—When an animal is struck by a train and left on the track, whereby a train following is derailed, the company is guilty of negligence. *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277.

Same—Failure of Driver of Street-car to Avoid Runaway.—A street-railway company is not liable for an injury to a passenger in one of its cars, because the driver in making a sharp curve and in stopping for passengers failed to avoid a runaway horse and vehicle which ran into the car, when the driver had no means of knowing what course the runaway would take. *Hamilton v. West end R. Co.*, 163 Mass. 199.

Same—Accumulation of Mud on Steps of Street-car.—If the step of a street-car was in a reasonably safe condition, and mud thereon was only such as would gather there, the weather considered while the car was in transit, from its starting-place to a point where plaintiff slipped from the step, there is no negligence on the part of the company. *Louisville R. Co. v. Park* (Ky. 1895) 29 S. W. Rep. 455.

Same—Act of God.—No recovery can be had for the death of a passenger, where the accident in which he lost his life, was caused by the act of God. *Norfolk and W. R. Co. v. Marshall*, 90 Va. 836.

The court stated the facts upon which the decision was based as follows: "But it is claimed by the defendant in error that the consequences of this act of God could have been prevented by the act of ordinary diligence on the part of the defendant company, and this can only be determined from the evidence in the case, which shows that the accident occurred on a dark and rainy night, the rain pouring in torrents at times, and flooding the track, which was laid along the side of the Blue Ridge Mountains, causing stoppages from time to time at exposed places. Before the train reached the place of the accident, the rain ceased and the train had reached a portion of the track which had always been regarded as perfectly safe. The character of the watershed was such along the mountainside that the water rapidly ran off, and the train proceeded on its way without further obstructions. The train at last reached the place of the accident, which was a dirt fill, provided with a stone culvert for the outlet of the water from the hillside above. This culvert was built 35 years before, on the construction of the road, as to which there had never been any accident. It was very dark, and the train ran upon the fill. No one suspected evil. The engine crossed, and its nose reached the embankment on the other side, where, by reason of what is called a "waterspout," the culvert had proved insufficient to carry the water off. A great pond had formed above the fill, and the water bore the fill out, leaving the rails and ties of the track unbroken. The train went down into the water, which, deprived of its support, formed a sort of cataract. A large number of persons were injured; among them the defendant in error's intestate, who was killed. The contention of the defendant in error is that the speed of this train was recklessly rapid, and it hurled the mail-car clear across on the opposite side. But the fact is that the

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whole train did not go on the embankment. Some of the cars stopped when the accident occurred and were wholly uninjured; and there is nothing whatever in the evidence—which is adduced by the defendant in error only—which shows any negligence on the part of the company."

Same—Carriage by Street-car Company of Passengers in Excess of Seating-capacity.—It is evidence of negligence on the part of a street-railway company to carry passengers greatly in excess of the seating-capacity of its trains, and to permit them to stand on the platform and steps of the cars. *Pray v. Omaha St. R. Co.*, 44 Neb. 167.

Same—Necessity that Alleged Negligence be Proximate Cause of Injury.—Before an act of negligence on the part of a railroad company can be made the basis for a recovery of damages, it must appear that such act was the natural and proximate cause of the injury, or directly contributed thereto. *Chicago, K. & M. R. Co. v. Bell* (Kan. 1895) 41 Pac. Rep. 209, citing *Railway Co. v. Kellogg*, 94 U. S. 469; *Scheffer v. Railroad Co.*, 105 U. S. 249; *Lewis v. Railway Co.*, 54 Mich. 55, 18 Am. & Eng. R. Cas. 263; *Henry v. Railway Co.*, 70 Mo. 288, 12 Am. & Eng. R. Cas. 136.

Same—Defective Appliances—Inspection of Cars.—A railroad company cannot discharge its liability to a passenger by showing that its agents inspected the cars before starting out on the trip, if in fact the train was not in proper condition with respect to the safety of the passenger. *Keating v. Detroit, B. C. & A. R. Co.*, (Mich. 1895) 62 N. W. Rep. 575.

Same—Defective Lock—Imprisonment of Passenger in Water closet of Car.—In an action by a female passenger for damages alleged to have been sustained because of discomfort and mortification at being unable to get out of a water-closet on a train by reason of some defect in the lock of the door, it appeared that a brakeman entered the closet from a window for the purpose of opening the door from the inside, that she voluntarily and with assistance left the closet by the window; that the train-employés made every effect to release her, and that the lock on the door was of the best known manufacture, and it was held that the company was not liable. *Gulf C. & S. F. R. Co. v. Smith* (Tex. Civ. App. 1895) 30 S. W. Rep. 361.

Same—Unauthorized Lease of Road—Responsibility for Acts of Lessee.—A common carrier has no power to relieve itself of liability to passengers simply by delegating its privileges to others, unless it has express statutory authority to lease its line and privileges. *White v. Norfolk & S. R. Co.*, 115 N. Car. 631.

Same—Injury to Passenger by Starting Car.—What Constitutes Negligence of Comp'n.—When a conductor put a car in motion before a passenger had time to step off, and as a consequence she was thrown from the step, fell to the ground, and was injured, there is negligence for which the company is liable. *Conway v. New Orleans & C. R. Co.*, 46 La. Ann. 1420.

Same—Duty of Company—Rebuttal of Presumption of Negligence.—It is the duty of a railroad corporation to afford a reasonable time for

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passengers to alight from its cars at the station to which it has assumed to carry them, and if a passenger is injured while attempting to alight at such station, by reason of the sudden and unannounced starting of the train, the burden is thrown upon the company of to show that the injury was not the result of its own act or negligence. *Raub v. Los Angeles T. R. Co.*, 103 Cal. 473.

Same—Confusing Signals by Passengers—Knowledge by Employees of Passenger's Danger.—Plaintiff signalled the motorman of a street-car, and stepped on the platform, and the car having come almost to a stop she gave another signal, and as she was stepping off, the car gave a "sudden jerk," and she was thrown to the ground and injured. It did not appear that the employes of the company knew of her danger, the nature of the second signal, or its necessity. *Held*, that no liability attached to the company. *Sirk v. Marion St. R. Co.* (Ind. App. 1895) 39 N. E. Rep. 421.

Same Ignorance of starting of Train.—A recovery may be had for injuries received by stepping off a moving train if the person injured had no knowledge, or by the exercise of ordinary care and prudence could have had no knowledge that the train had started before he began to alight. *Merritt v. New York, N. H. & H. R. Co.*, 162 Mass. 326.

Same—Evidence—Contradictory Statements.—Where, in an action for personal injuries, alleged to have been sustained by the starting of a car while plaintiff was alighting, a witness testified he saw a car coming down the street and thought it was coming too fast, that it slowed up, and that plaintiff got off while it was still moving slowly, the admission of a statement by him on cross-examination that he had admitted to plaintiff's attorney that it was the most careless piece of business he ever saw, but that in saying so he meant the speed of the car as it came down the street, did not constitute reversible error. *Hardy v. Milwaukee St. R. Co.*, 89 Wis. 183.

Same—Injury by Appliance on Street car—Instructions—Failure to instruct as to all Negligent Acts Charged.—In an action for personal injuries to a female passenger, alleged to have been caused by a hook on a chain hanging from the platform and catching on her dress, it was charged that the company was negligent in starting the car while plaintiff was standing on the last step, and that the hook was negligently permitted to hang from the platform, and it was—*held*, that an instruction that if the hook was in its proper place when the car commenced its trip and was displaced by plaintiff or some other passenger, and by hanging caught plaintiff's dress, she could not recover, was erroneous because failing to further instruct the jury that defendant would not be liable if the hook was the sole or proximate cause of the injury, and because ignoring the other negligent act charged, i. e., the starting of the car while plaintiff was on the step. *Bowdle v. Detroit St. R. Co.*, (Mich. 1894) 61 N. W. Ren. 529.

Same—Speed of Car Before Approaching Scene of Injury.—*Instruc-*

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tions.—Where, in an action for personal injuries alleged to have been sustained by the starting of a car while plaintiff was alighting, a witness testifies that a statement made by him that it was the most careless piece of business he ever saw, referred to the speed of the car as it came down the street, it is error to refuse to instruct the jury that the speed as it approached and before the accident had no bearing on the question of defendant's negligence. *Hardy v. Milwaukee St. R. Co.*, 89 Wis. 183.

Same—Province of Jury.—Where it is shown that when a train reached a station it stopped a short distance beyond the platform, and while the plaintiff was in the act of alighting, and when she had reached the lower step of the car, the train started without warning, throwing plaintiff to the ground, thereby causing the injuries complained of, it was held that the question of plaintiff's negligence was for the jury. *Raub v. Los Angeles*, 113 Cal. 473.

Injuries to Passengers Boarding Trains—Contributory Negligence.—A person cannot recover for personal injuries sustained while negligently attempting to board a moving train, if his negligence contributed to the injury. *Schaefer v. St. Louis & S. R. Co.*, Mo. 1895, 30 S. W. Rep. 331.

Same—Unauthorized Admission by Attorney in Petition.—An admission in a petition signed by the attorneys that a train was moving when petitioner attempted to board it, is not admissible in evidence in a subsequent action, when the attorney who drew the petition testifies that he was not informed by the person injured or the plaintiff, her husband, that the train was moving when the injury was inflicted. *International & G. N. R. Co. v. Mulliken* (Tex. Civ. App. 1895), 32 S. W. Rep. 152.

Same—Instruction as to Burden on Company.—The denial of an instruction that if the jury "believe from the evidence that plaintiff was a passenger on one of defendant's cars (and while exercising reasonable care and diligence with respect to his own safety), the car was suddenly started, causing the injury now being inquired into, then the burden is thrown upon the defendant to show to the satisfaction of the jury that the servants and employes of the defendant managing the car exercised the utmost human care in the management of the same, or that the accident occurred by reason of some cause not under the control of the servants and employes of defendant, and unless the defendant has so satisfied the jury their verdict should be for the plaintiff," furnishes no ground for setting aside a verdict for defendant. *Schaefer v. St. Louis & S. R. Co.*, (Mo. 1895) 30 S. W. Rep. 331; *citing* *Furnish v. Railway Co.*, 102 Mo. 438, 669.

Same.—Province of Jury.—The question of contributory negligence in attempting to board a moving train is a question of mixed law and fact, and should be determined by the jury under proper instructions. *Schaeffer v. St. Louis & S. R. Co.*, (Mo. 1895) 30 S. W. Rep. 331.

Abstracts of Recent Decisions Injuries to Passengers

Injury to Passenger Violating Rule of Company—*Passenger Leaving Car by Baggage Compartment.*—A passenger who, in a crowded car, instead of leaving by the exit provided for passengers, gets off through the side door of the baggage compartment, in violation of a rule, and thereby sustains injury, is precluded from recovery. *Deery v. Camden & A. R. Co.*, 163 Pa. St. 403.

Same.—*Implied Consent of Passenger to Rule—Concurrent Negligence of Company's Servants.*—On the part of the passenger, his consent is implied to all the company's reasonable rules and regulations for entering, occupying, and leaving its cars, and, if injury befall him by reason of his disregard of regulations which are necessary to the conduct of the business, the company is not liable in damages, even though the negligence of its servants concurred with his own negligence in causing the mischief. *Deery v. Camden & A. R. Co.*, 163 Pa. St. 403, citing *Sullivan v. Railroad Co.*, 30 Pa. St. 234.

Same—*Passenger Occupying Platform—Construction of Nebraska Statute.*—Section 110, c. 16, Comp. St., providing that in case any passenger on a railroad shall be injured while on the platform of a car while in motion, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, said company shall not be liable for the injury; etc., being a limitation upon a recognized liability, is to be strictly construed; and, in order that such statute shall be applicable, the car must be in motion when the accident occurs, and there must be some connection of cause and effect between the injury of the passenger and his being upon the platform. and notices required by the statute must be posted in the cars of the train wherein the accident occurs. *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578. *Following and reaffirming Chollette v. Railroad Co.*, 26 Neb. 159, 33 Neb. 143.

Same—Same—*Passenger Justifiably on Platform—Indiana Statute.*—Rev. Stat. Ind. § 3928, which provides that, "In case any passenger on any railroad shall be injured on the platform of a car, or any baggage, wood, or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger car then in the train, such company shall not be liable for the injury, provided said company at the time furnished cars sufficient for the proper accommodation of the passengers," does not apply to the case of a passenger justifiably leaving the car, when the platform is the only mode of egress, and the passenger is there by invitation of an employé of the company for the purpose of alighting. *Baltimore & O. R. Co. v. Meyers*, (U. S. Cir. Ct. App. 7th Cir.) 62 Fed. Rep. 367.

Injuries by Operation of Train—*Operation of Car around Curve at High Rate of Speed—Knowledge of Passenger.*—A passenger who is aware of the fact that in rounding curves cable-cars proceed at a high rate of speed, and who is injured by being thrown to the ground from a car passing around a curve, cannot recover when it appears

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that there was no defect in the appliances or in the construction of the road, and that the manner of rounding the curves was unavoidable. *Hite v. Metropolitan St. R. Co.*, (Mo. 1895) 31 S. W. Rep. 262.

Same—Same.—Where the evidence shows that an injury was caused by the lurch of a car in rounding a curve, and that the only way cars could be operated around the particular curve where the accident happened was by the speed of the cable, and that the lurch or lunge which precipitated plaintiff from the car was incident to its operation and could not be avoided, there can be no recovery. (On rehearing.) *Hite v. Metropolitan St. R. Co.*, (Mo. 1895) 32 S. W. Rep. 33.

Same—Same—Proof of Rate of Excessive Speed.—If the proof shows that a car was operated at excessive speed while rounding a curve, whereby a passenger was thrown off and injured, the rate of speed at which the car was operated is immaterial. *Gidionsen v. Union Depot R. Co.*, (Mo. 1895) 31 S. W. Rep. 800.

Same—Admissibility of Evidence as to Speed.—It is not error to admit competent testimony as to the speed of a train, though it may be of little value. *Keating v. Detroit B. C. & A. R. Co.*, (Mich. 1895) 62 N. W. Rep. 575. *Citing Guggenheim v. Railway Co.*, 66 Mich. 155, 32 Am. & Eng. R. Cas. 89; *Railroad Co. v. Van Steinburg*, 17 Mich. 99.

MCPEAK (John G.)

v.

MISSOURI PACIFIC R. CO.

(*Supreme Court of Missouri, March 18, 1895.*)

Contributory Negligence—Jumping from Moving Train by Direction of Employe [(1) p. 259]—**Sufficiency of Petition—Failure to Allege that Direction to "Jump off" was within Scope of Employe's Duty.**—A petition for personal injuries sustained because of a direction by a brakeman to "jump off" a moving train is defective if it fails to allege that the exclamation was within the scope of the servant's duties or within the boundaries of his delegated authority. (*Page 234.*)

Same—Competency of Proof under Immaterial Allegation.—An allegation in the petition, that there being no chain across in front of the rear door of the car, plaintiff jumped from the back part of the platform instead of getting off by the side steps as he could and would have done if the chain guard had been placed and kept across the back end of the platform, etc., did not strengthen the petition so as to render evidence in support of the allegation admissible. (*Page 237.*)

Same—Contributory Negligence [(1) p. 299].—Conceding that the brakeman had authority to make the exclamation and that it was uttered in

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the line of his duty, the company would not be liable if there was no real danger and plaintiff taking no precaution to ascertain if there was, jumped from the train in an opposite direction from that in which it was moving. (*Page 237.*)

Same—Submission to Jury of Question of Employee's Authority in Absence of Evidence Respecting Same.—Where in such a case there is no evidence that the brakeman was acting within the line of his duty and within the scope of his employment, it is error to submit to the jury whether the act complained of was or was not done in the exercise of a duly delegated authority. (*Page 240.*)

Remarks by Court to Jury.—The next day after the jury had retired it was called in, and on a statement that they could not agree the court addressed them as to the trouble and expense of the case, and upon one of the jurors stating that eleven of them "could get together in about one minute" the court directed them to "look it over" and said, "I trust and presume that every juror is acting rationally in this matter, and that nobody is acting from a dogmatic spirit merely for the purpose of asserting his opinion." *Held*, that the remarks of the court required a reversal of the judgment. (*Page 241.*)

GANTT, J., *dissenting*. BURGESS, J., *dissenting in part*.

APPEAL from Bates county circuit court. *Reversed.*

Action for damages for injuries received while a passenger on the defendant's train. Leaving off the usual formal allegations, the petition is as follows: "Plaintiff states that on the morning of March 12, 1892, he entered defendant's regular train over its interstate road at Butler, Missouri, as a passenger thereon from Butler to Foster, Bates county, Missouri; that said train was a 'mixed train,' consisting of freight cars, a combination express, mail, and passenger car, and what is known as a 'caboose car' attached to the passenger car, and used as a smoker, and was the rear car of the train. Plaintiff states that on said train the brakeman did and performed the duties of porter, and took charge of the passenger and caboose cars, calling stations, and assisting passengers on and off the cars, and giving them information and assistance, and looking after their safety and comfort, and having general supervision of the car and its occupants; that such are the duties of porter, and on its said train these duties are devolved on its brakeman by defendant.

"Plaintiff states: That he took his seat in said smoking or caboose car, and that the train left Butler about 'on time,' being 7.15 A.M. That there was a train just in front of train on which plaintiff was a passenger, and also a work or gravel train just behind it. That after leaving Butler some three to five miles, and while said brakeman and another of defend-

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ant's employes were in the lookout of said caboose car, the engine whistled 'Down brakes,' and said brakeman or porter instantly, excitedly, negligently, and recklessly called out 'Jump!' or 'Jump for your lives!' Plaintiff, knowing that there was a train just in front and another just in the rear, started to get off the train by the rear platform.

"That, as he afterwards learned, said train was on a down grade, and running very rapidly, and there being no chain across in front of the rear door of the car, and plaintiff, not being able to turn to the steps, jumped and fell to the ground from the back part of the platform, through the opening, instead of getting off by the side steps, as he would and could have done if the chain guard had been properly placed and kept across the back end of the platform of said car.

"That by reason of the negligence and carelessness of defendant and its employes, as aforesaid, and as a direct result thereof, the large bone of plaintiff's right leg was broken, and in such a way as to involve permanently the knee joint, and the left leg was and is paralyzed from the knee to the hip joint, and the upper part of the large bone of the lower arm right at the elbow was broken, destroying the use of the joint, and breaking loose the ligaments and muscle attachments about the elbow, and the left shoulder was bruised and broken, so that the arm cannot be raised or moved sideways, and the wrist joint was so injured that its movement in any direction is destroyed, and the hand cannot be turned either forward, back, or sideways, and the hand and fingers have lost their motion and strength, so that by these injuries to the left arm, shoulder, elbow, and wrist the entire left arm is totally and permanently useless and paralyzed; and that by the fall and concussion the small of the back was so injured and affected that there is pain and soreness there, and plaintiff requires assistance and help to get up in the mornings; and that all of said injuries are permanent, and render plaintiff a cripple for life.

"That prior to these injuries plaintiff was of great strength, activity, and power, athletic and healthful. That since that time he has become weak, and lost strength and flesh, is without activity, and his general health has become greatly and permanently impaired. Plaintiff avers that he has suffered great pain and anguish of body and intense mental anxiety from the wounds, injuries, and bruises aforesaid, and was con-

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fined to his bed and house for six months, and can now get about only with the aid of canes and crutches.

“ Plaintiff says that he was agent and attorney at Foster for various parties, and engaged in business, and that he realized therefrom the sum of \$100 per month, all of which during the time he was so confined to his bed and house was a total loss to him, and that he has been at great expense in procuring medical and surgical attention and services, and that he has paid and is to pay therefor the sum of \$200, and pleads the same and loss of time as special damages, averring the same to be \$800.

“ Plaintiff alleges that all of said injuries were occasioned by the fault, negligence, careless, and indiscreet conduct of defendant, its agents, servants, and employés, in the way and manner hereinbefore stated, and that plaintiff himself was without fault or negligence, and in no manner contributed to said injuries by any fault or negligence of his own.

“ Plaintiff avers that by the injuries aforesaid, and the pain and suffering and loss of time and money expended aforesaid, he has been damaged in the sum of thirty thousand dollars, for which sum and for his costs herein he prays judgment against said defendant.”

The answer of defendant is the following: “ Said defendant, for answer to plaintiff’s petition, denies each and every allegation therein contained; wherefore it prays to be discharged, with its costs. Said defendant, for further defense, states that, if said plaintiff sustained the injuries charged in petition, it was by reason of his own negligence, carelessness, and recklessness directly contributing thereto in jumping from the moving train, without any legal excuse therefor, and without any fault of this defendant; wherefore defendant prays to be discharged, with its costs.”

Answer.

The reply was a general denial.

The facts in evidence are substantially these: On the 12th day of March, 1892, the defendant company was running a mixed train from Butler, in Bates county, to the town of Foster, in the same county, and beyond.

Facts.

This train was made up of a combination express, freight cars, a mail car, and a passenger car, and to the last-named car was attached what is commonly termed a “ caboose,” a car which was used as a smoker, which was the rear car of the train.

On the morning of the day mentioned, plaintiff, W. A.

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Ephland, Grant Goodenough, and F. M. Thrall were passengers, who preferred to ride in the caboose rather than in the passenger car, and the general course of the road is south until it reaches the junction of the two roads, some $3\frac{1}{2}$ miles from Butler, where the road on which plaintiff was traveling branches off from the main line, and proceeds in a south-westerly and westerly direction, through Bates county, into the state of Kansas. The caboose in which plaintiff and the others named were riding had seats upon either side of the car, running lengthwise with same. On the west side, and near the south end of the caboose, there was an open cupola, with a chair; and a brake immediately south of same in the cupola. The brakeman who handled this brake, being the only brake in the car, when occupying the chair had his face turned to the south, towards the engine. On the opposite or east side of said caboose, going south, there was another cupola, boxed up to some extent, with two seats facing each other therein. The seat along the caboose on east side also passed under said east cupola, but the view of said cupola on east side of car was partially obstructed by its being boxed up. The caboose is a kind of box car, with windows in the sides.

There is positive testimony that Abell, the conductor, and Lamb, were occupying seats in the east cupola, in which there was no brake. Abell, the conductor, sat facing south, and opposite him, their knees touching, sat Lamb, a "swing" brakeman, who was put on to go out with the train leaving Butler in the morning, and return upon the other train when it was met. His duties were to take the switch list prepared by the conductor at every station, and get the cars out at the place designated on the freight list, and also to set the outside or end brakes of the car upon signal to that effect being given. Lamb had nothing whatever to do with calling out the stations, nor with the passengers getting on and off the caboose. Those were duties belonging to the hind brakeman.

On the opposite or west side of the cupola sat Joseph Little, the hind brakeman, who sat at the brake on the west side of the cupola, the only brake inside the caboose, and he was facing south. The respective positions occupied in the cupola by the parties mentioned is shown by their direct and unequivocal testimony, and Thrall testified that Abell and two trainmen were up in the cupola, and neither plaintiff nor Ephland nor Goodenough would venture to swear that Abell,

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Lamb, and Little were not in the cupola. There is some controversy as to who the brakeman who sat at the hind brake in the cupola was.

Plaintiff, Ephland, and Goodenough testified with more or less assurance that it was Lamb; but their testimony loses much of its probative force from the fact that the brakeman who sat at the hind brake had his face towards the south, and their opportunities to see who it was who sat at the hind brake in the cupola were by no means so good as those who were seated in the cupola, and their testimony, as already seen, is direct and positive. In fact, it is conceded by all the witnesses that the brakeman who occupied the seat on the west side of caboose attended to the only brake in said car, and that he was facing south, towards the engine, from the time the train left Butler until the accident.

Facts continued.

With matters in this situation, when the train had proceeded southward $1\frac{1}{2}$ miles, the usual signal for brakes was given,—a single blast of the whistle. The train was then traveling about 15 miles per hour, and the signal was given in order to pick up a flagman, who had gone out on a freight train, which had preceded the one on which plaintiff was riding, and stopped off to warn the crew on plaintiff's train that the other train was on ahead. When this whistle was sounded, plaintiff testifies that he was sitting in the north end of the caboose, and could not see whether any person was sitting in the cupola or not. Yet he also testifies that, upon the blast of the whistle being made, Lamb sprang to his feet very excitedly, and hallooed out "Jump off!" and, on account of his manner of jumping and the manner of his words, plaintiff started out of the car, and jumped off.

In another place, describing to the jury how he got off the train, plaintiff states: "I think the door was open. I won't be positive as far as that is concerned. And, when I started out, I remarked to the passengers, I says, 'Come on, boys,' and just shot right out. There was nothing to prevent me from going straight out of the door, and right off the car. There was no obstruction whatever. I just run out, and jumped off in the centre of the track." Plaintiff also testifies that he does not know for what the signal whistle was blown, nor that he went to the windows to see what was the

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cause for its being blown, though he could readily have done so.

The testimony of Ephland is not so positive as to what was said by Lamb, but he thought the expression was: "For God's sake, jump!" "Jump for your lives!" or "Jump off!" He could not exactly say which. This witness also states that Lamb, whose manner was hurried or excited, after making the exclamation, then swung down from the platform of the cupola, and ran out of the door.

Goodenough testifies: That the first thing that drew his attention was the brakeman jumping to his feet, and hallooing, "For God's sake, boys, jump!" That the
Facts continued. brakeman said this in an excited manner. And the witness states: "We all jumped to our feet, and Mr. McPeak jumped off, and Mr. Ephland jumped off, and I jumped off the rear end of the car." None of the witnesses for the plaintiff, however, pretend to deny that the brake in the cupola was set; nor that it was set by Little, the hind brakeman, who began to set it as soon as the signal was given,—a fact uncontradicted, and testified to both by Abell and Little; nor that Lamb did not, as soon as he swung down, go and set the brake at the front end of the car, one of his duties as swing brakeman,—a fact testified to by Lamb himself, Abell, and, in effect, by Little.

Thrall, a farmer, testifying for defendant, says he thought he heard Lamb halloo, but says Lamb was up there in the lookout then, and said something,—halloed,—but that he said nothing about jumping off or words to that effect. Thrall, whose first name is Frank, gives this rather ludicrous account of the transaction now in litigation: "Somebody halloed, and Mr. McPeak jumped up; says, 'Oh, God!' or 'Oh, my God!' and run out. Mr. Ephland followed him, and I went out after Mr. Ephland. Well, when Mr. McPeak went through the door, it kind of swung to, and, as Mr. Ephland pulled the door open I saw Mr. McPeak jump off the train, and I throwed my hand on Bill, and I says, 'Bill, don't jump.' And Mr. Goodenough run between me and Mr. Ephland, and says, 'Jump, boys, jump!' And with that Mr. Ephland jumped off, and this man jumped off right after him. They both jumped off about the same time. I run down the steps, and couldn't see anything, and Bill Lamb was standing on the passenger-coach steps; and Bill says: 'Frank, what

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in the hell is the matter back there?' And I says: 'Every son of a bitch has jumped off back here.' And I went over on the other side, and looked ahead, and couldn't see any danger. About that time the train slowed up, and me and the conductor stepped off and went back." Lamb and Little deny that they used any such exclamation as "Jump off!" or any words to that effect.

Little and Abell, who were both in the cupola, deny that they heard any such exclamation made. And Abell, Lamb, and Little deny that they heard one make such an exclamation; and they also deny that they thought, when the usual signal was given for brakes, that anything unusual had occurred, or that they were at all excited. And the evidence shows that, at the time the whistle was blown, there was no train in sight at either end of the track. On the other hand, it is evident from what plaintiff testifies—and his actions demonstrate this—that he was greatly excited and scared, and that he had been somewhat injured in a wreck or collision on a former occasion. Ephland and Goodenough were also excited to some extent, but they did not take a flying leap, as did plaintiff, but held onto the railing, and swung themselves down, and it does not appear that they received any considerable injury. Evidence was also given as to the extent and permanency of plaintiff's injuries.

At the close of plaintiff's case, defendant asked an instruction in the nature of a demurrer to the evidence, which being denied, evidence was introduced on its behalf, the substance of which has already been set forth.

Facts continued.

The case was then submitted to the jury on the following instructions, among others, given at the instance of defendant: "The court further instructs the jury that, under the evidence in this case, defendant was guilty of no negligence in failing to provide a chain or bar or handrail across the north end of the platform of the caboose on which plaintiff was riding."

The case was submitted to the jury at about 8 o'clock P.M. on the 20th day of February, 1893. At 10.30 o'clock A.M. on February 21, 1893, the jury was called in, and the court addressed the following remarks to them: "The Court: Gentlemen, have you agreed upon a verdict? The Foreman: No, sir. The Court: It was a great deal of trouble to try this

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case, and a great deal of expense, and I don't have any expectation of ever getting better men to try it than you. Mr. Radford, one of the jury: Judge, there's eleven of us that could get together in about a minute. (Exception saved by defendant.) The Court: Verdicts are often reached in cases after further consideration, by trying it a little longer. I don't want to put you gentlemen to any discomfort unnecessarily; yet I think you ought to look it over, and experience shows that it frequently takes some little time for jurors to get their minds together. I trust and presume that every juror is acting rationally in this matter, and that nobody is acting from a dogmatic spirit, merely for the purpose of asserting his opinion,"—to which defendant at the time excepted.

Afterwards, to wit, on the same day (June 21, 1893), at 12 o'clock M., the jury returned into open court the following verdict, to wit: "We, the jury, find the issues for the plaintiff, and assess his damages at forty-seven hundred dollars. John E. Shutt, Foreman."

Thereupon the court, in accordance with said verdict, rendered its judgment in favor of plaintiff, and against defendant, for the sum of forty-seven hundred dollars, to which action of the court the defendant, by its counsel, then and there excepted.

After unsuccessful motions for a new trial and in arrest, defendant appealed to this court.

R. T. Railey, for appellant.

T. W. Silvers, Green & Clark, P. H. Holcomb, and J. D. Parkinson, for respondent.

SHERWOOD, J.—1. Among the grounds urged in the motion in arrest, and incidentally and indirectly urged in this court by quotation from the authorities, is the point that the petition does not state facts sufficient to constitute a cause of action. This, of course, if true, is such a defect as is never waived, and may be raised at any time while the cause remains pending and undetermined, either in the court of first instance, or in that of last resort, and may be raised by the court of its own motion. *Smith v. Burrus*, 106 Mo. 94, and cases cited; Rev. St. 1889, §§ 2047, 2304.

It will be noted that it is not averred in the petition that the litigated act was one authorized by the master, or done by

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the servant within the scope of his employment. The act must have been done by the servant "in the line of his duty, and in furtherance of the master's business"; and, "in order to be held chargeable for the acts of another, the person sought to be charged must at least have the right to direct such person's conduct, and to prescribe the mode and manner of doing the work; and the person for whose acts he is sought to be charged must, at the time when the act complained of was done, not only have been acting for him, but also must have been authorized by him, either expressly or impliedly, to do the act." Wood, Mast. & S. (2d Ed.) pp. 525, 527.

There is nothing in the petition which directly or indirectly charges that the act done, to wit, the exclamation "Jump!" etc., was within the scope of the servant's duties, or within the boundaries of his delegated authority,—something indispensable to the statement of a cause of action against the defendant. "Unless the duty results in all cases from the stated facts, the declaration so framed will be bad." And the express allegation of an existing duty will not aid the declaration if the facts recited do not raise the duty a breach of which was complained of. If the facts stated do this, then the allegation of duty is superfluous. 2 Thomp. Neg. 1244, and cases cited. "Beyond the scope of his employment, the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act in the doing of which he is guilty of negligence in the course of his employment." *Marrier v. Railway Co.* (Minn., 1884), 17 N. W. 952. If the servant steps out of the course of his employment to do a wrong, either negligently, fraudulently, or feloniously, the master is no more liable than a stranger. *Foster v. Bank*, 17 Mass. 479. This court has frequently announced the same principle. *Snyder v. Railroad Co.*, 60 Mo. 413; *Sherman v. Railroad Co.*, 72 Mo. 53, 4 Am. & Eng. R. Cas. 589; *Cousins v. Railroad Co.*, 66 Mo. 576; *Stringer v. Railway Co.*, 96 Mo. 299.

In *Snyder's Case*, *supra*, it was ruled that a petition fails to state a cause of action which states that the act was done while the servant was engaged in the service of the master, but which fails to state that the act complained of was one which pertained to the particular duties of that employment, and that the general averment

Same—Cases
examined.

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that the act of the servant was done while he was acting within the line of his duty was a mere conclusion of law, and did not help or cure the other defective averments; and so it was held that the general demurrer to the petition in that case was well taken.

Of similar import is the ruling made in *Davis v. Houghtelin*, 33 Neb. 582, where a general demurrer questioned the averments of the petition; and on that occasion the petition was held fatally defective because of failing to set forth facts showing, in terms, that the act done was within the range and authority of the servant's duties.

In *Golden v. Newbrand*, 52 Iowa, 59, cited with approval in the preceding case, Roenspeiss was given a revolver by defendants, and told to guard their brewery. Subsequently one Golden came on the premises, and did some damage to the property, whereupon Roenspeiss pursued him, and, as he ran away, shot and killed him. Upon these facts being developed in evidence, the lower court granted the motion of defendants to exclude all the evidence introduced, because it failed to show any liability on the part of the defendants; and, in discussing the action of the trial court, SEEVERS, J., said: "The theory of appellant is that Roenspeiss was employed to guard and protect the brewery, for which purpose he was furnished a pistol, and that he shot the deceased while in the line of his duty. Without determining whether, if this was all, the defendant would be liable, we think the fact that the deceased was retreating from the brewery at the time the fatal shot was fired shows conclusively it was not fired for or with the intent of protecting the brewery, or in the line of Roenspeiss' duty. If Roenspeiss had shot with the pistol from the brewery a person peaceably passing along the highway, the defendants clearly would not have been liable, and we think there is no essential difference between the case supposed and the one at bar. To protect the brewery did not require Roenspeiss to shoot and kill a person who was retreating therefrom. The killing was not therefore done in the line of the duty Roenspeiss was employed to perform." And in this view the judgment was affirmed.

Applying to the case at bar the tests elicited from the foregoing authorities, it must be apparent that the petition is fatally defective, in that it is wholly lacking in an essential allegation without which the plaintiff is not entitled to recover,

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because in actions for injuries by negligence, even under code systems, the fundamental principle is to be applied that, in order to the validity of the petition, it must contain "such facts as, if they were admitted, would justify the court in rendering judgment for the plaintiff." 2 Thomp. Neg. 1243.

Nor is the petition in this instance rendered a whit stronger by reason of the allegation that "there being no chain across in front of the rear door of the car, and plaintiff not being able to turn to the steps, jumped and fell to the ground from the back part of the platform, through the opening, instead of getting off by the side steps, as he could and would have done if the chain guard had been properly placed and kept across the back end of the platform of said car."

Proof under
immaterial
allegation.

It is passing strange, that such an allegation should have been allowed to be made even the partial basis for a recovery. That chains, etc., should be used in preventing the escape of wild Texas steers, or "those pampered animals that rage in savage sensuality," and compose the menageries that travel through the country on our railroads, excites no surprise; but that similar restrictive measures should be employed to restrain human beings from making fierce dashes for liberty is certainly without parallel. And yet evidence was gravely introduced to support this remarkable allegation. This being the case, it was but natural that the jury should have given it weight, and used it in support of and to swell their verdict. For this reason it was that instruction No. 7 asked by defendant should have been given, for that instruction was in the nature of a motion to exclude the grossly incompetent evidence.

It will not do to say, as does counsel for plaintiff, that they asked no instruction upon that allegation and evidence, purposely refrained therefrom, because, as it was, the jury remained in the dark upon the matters involved in that allegation and its supporting evidence. Indeed, the lower court must have regarded the allegation valid and the evidence competent, or surely it would not have denied the instruction, which would have excluded it. If the lower court regarded the allegation and evidence as constituting one of the valid bases for a recovery, small blame belongs to the jury for doing the same thing; hence the necessity for granting the instruction, and the error in its denial. Moreover, by the express

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terms of instruction 3, given at plaintiff's instance, the jury were directed to "take into consideration all the facts and circumstances detailed in evidence."

2. The same considerations which require that the petition should, by facts stated, show and allege that defendant's brakeman Lamb was in the line of his duty and in
Sufficiency of proof. furtherance of his employer's business when he made the supposed terror-creating exclamation, also require that proof should be made of such allegations, and the burden of making such proof, of course, lies on the party holding the affirmative. We do not regard this proof as having been made, and for these reasons: Abell, the conductor, Little, the hind brakeman, and Lamb, the alleged peccant panic breeder, all testify—and their testimony on this point is uncontradicted, and the facts were peculiarly within their own knowledge, they being in the employ of the defendant—that it was no part of Lamb's duties to do anything in regard to the passengers, and there is no circumstance in evidence that disputes this. An attempt is, however, made on the part of plaintiff, to show that Lamb sat in the hind brakeman's chair, on the west side of the cupola, and uttered the accident-causing exclamation. But testimony of this sort loses what little weight it might otherwise possess by the fact that it is flatly contradicted by the testimony of Abell, Lamb, and Little, all of whom were in the cupola at the time the whistle was blown, in full and unobstructed view of each other's faces; while neither plaintiff nor any one for him would swear that those three parties were not up in the cupola when the signal was given, nor would plaintiff or his witnesses swear that they saw Lamb set the brake in the cupola, while Abell and Little both testify that it was the latter who set the cupola brake, and Abell, Lamb, and Little all testify that it was the duty of Little to set that brake; and, besides, it is shown by all the witnesses that Lamb, immediately upon the signal being given, swung down from the cupola, and he swears that he went at once and set the coach or forward brake, as was his duty to do, and on this point he is virtually sustained by Thrall, who testifies to seeing Lamb on the passenger coach steps when the latter asked the question already related, as to what was the matter, etc.

Besides that, it clearly appears from the evidence that plaintiff, Ephland, and Goodenough were seated down in the

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caboose in a north or northeast direction from where the hind brakeman was sitting, who was facing south; and plaintiff's own petition charges that "said brakeman and another of defendant's employes were in the lookout of said caboose car"; and Thrall testifies that there were three trainmen up in the cupola.

As to whether some such exclamation was made as the petition charges, and that Lamb made it, is testified to by plaintiff, Ephland, and Goodenough; and, though this is denied to be the case by Lamb, Little, Abell, and Thrall, yet, the evidence on this point being in conflict, it would be a matter for the determination of the jury. But necessarily this statement proceeds on the supposition that Lamb not only made the exclamation while he was employed, but that it was done in the course of his employment, in the furtherance of his employer's business, and under his authority so to do, which matter is not only not proven, but positively disproven by the only witnesses who profess to have any knowledge of the fact. Of course, it stands to reason that their positive and direct testimony as to the nature and scope of Lamb's employment could not be abated or in any wise overthrown by testimony that Lamb sat in Little's chair, or that he made the alleged exclamation. Otherwise corporations and other employers would be at the mercy of every intermeddling employé, and liable for their reckless or wanton acts or ejaculations to be mulcted in unjust and unwarranted damages.

3. But the concession may be made that Lamb had authority to make the exclamation that he is charged with making, and that it was uttered in the line of his duty, in the course and in furtherance of his master's business: and still this would create no liability on the part of the defendant, as will shortly appear, for the following reasons: It is disclosed by undisputed evidence that there was no real danger, and no object within the range of vision from which danger could be apprehended, as both the advance and rear trains were out of sight. Plaintiff was guilty of the grossest contributory negligence, and even recklessness, in taking no precaution by looking out of the windows, or otherwise, before running out of the caboose, and jumping off a train going at the rate of 15 miles an hour, in the opposite direction from which he jumped.

**Contributory
negligence.**

The rule in such cases is thus laid down by the court of

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appeals of Kentucky: "It is urged that, when one is frightened by something resulting from the neglect of the carrier, he cannot be charged with contributory neglect to any extent. He, however, must act upon a reasonable apprehension of peril. His conduct must conform to that of an ordinarily careful man under like circumstances. He has no right, upon the happening of some trivial occurrence, or such as would not create fear or apprehension of injury in the mind of an ordinarily prudent or careful person, to bring injury upon himself, and then recover damages by reason of it. This rule is sustained by both reason and precedent."

Railway Co. v. Ware, 84 Ky. 267, 27 Am. & Eng. R. Cas. 206. This accords with the views of Lord Ellenborough in the early and leading case of *Jones v. Boyce*, 1 Starkie, 493, where he said: "If the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. * * * A coach proprietor certainly is not to be responsible for the rashness and imprudence of a passenger. It must appear that there existed a reasonable cause for alarm." See, also, announcing in effect the same principle, *Railway Co. v. Felton*, 125 Ill. 458; *Railway Co. v. Wallen*, 65 Tex. 568, 26 Am. & Eng. R. Cas. 219; *Filer v. Railroad Co.*, 49 N. Y., *loc. cit.* 52, and cases cited; *Railway Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323.

Now, upon the facts in evidence in this case, it cannot be said that plaintiff was in a position of peril, either actual or apparently imminent. Certainly there were no physical signs of danger, nor was the situation such as to arouse the fear of an ordinarily careful and prudent person. On the contrary, plaintiff's act must be regarded as the result of a rash and baseless apprehension of nonexistent and nonapparent danger. Under the authorities cited, therefore, plaintiff has no ground for recovery, even if the act of the brakeman were within his delegated authority. But where, as here, there is no evidence that the servant was acting within the line of his duty and within the scope of his employment, it is wholly immaterial how wrongful or how injurious the unauthorized act of the servant may be; and it is error to submit the question to the jury whether the act complained of was or was not done in the exercise of a duly dele-

Submission to
jury in absence
of evidence.

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gated authority. *Coal Co. v. Heeman*, 86 Pa. St. 418. In *Farber v. Railroad*, 116 Mo. 81, the principle here announced was recognized, where the lower court had sustained a demurrer to the evidence on the point mentioned, and its judgment was affirmed.

4. In consequence of the views already expressed, it is quite unnecessary to discuss other instructions, whether given or refused. We therefore pass to the remaining point left for discussion, to wit, the calling in of the jury, and the remarks made to them by the court. The functions of the court and of the jury are necessarily separate and distinct, and so they should remain. No encroachment should be suffered by either tribunal upon the other, for in this way is justice best administered. This court has ever sedulously maintained the strict line of demarcation between the functions of the court and those of the jury. Thus, in *State v. Alexander*, 66 Mo. loc. cit. 164, it was said: "The jury are the triors of the facts, and the court has no more right to interfere with them while considering of their verdict, except, in open court, to discharge them from time to time, or, in the presence of the accused and his counsel, to instruct them as to the law of the case, than the jury have to invade the province of the court." Our statute only contemplates that the media of the transmission of thought between the court and jury in regard to any pending cause shall be by written instructions, given in open court. Rev. St. 1889, § 2188.

In *Edens v. Railroad Co.*, 72 Mo. 212, 5 Am. & Eng. R. Cas. 459, this state of facts occurred: "After the jury had been out several hours, they came into court, and announced that they were unable to agree. The judge then spoke to them of the time that had been consumed in the trial of the case, and discharged them until next morning, telling them: 'Gentlemen, come back to-morrow morning with a determination to compromise.' When they came into the box next morning, the court again spoke to them of the great importance to the parties and to the county that they agree upon a verdict, telling them, orally, 'that many things juries were authorized to compromise, such as amounts; that very seldom twelve men went into the jury room with the same notions as to amounts, and compromises were necessary;' and directed them to retire and make a verdict." And the action of the

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trial court was condemned, and the judgment, for that and other causes, reversed.

In the more recent case of *State v. Hill*, 91 Mo. 423, the facts in regard to the action of the trial court towards the jury were these: "The cause, after argument, was submitted to the jury at eleven o'clock Wednesday evening. Afterwards, at 9.30 o'clock Thursday morning, the jury were called into court, and inquiry made by the judge whether they had agreed upon a verdict. Receiving a negative reply, the judge addressed the jury as follows: 'Gentlemen, I will be here until eleven o'clock to-day, at which time I expect to go home, and, if you agree upon a verdict against that time, you will be discharged. If you cannot agree by that time, court will adjourn from day to day until such time as you may agree,'—to which verbal charge to the jury the defendant excepted. The jury then retired to their room, and at 10.30 o'clock A. M. returned a verdict finding the defendant guilty." And it was there ruled that such language was made by the court to induce a verdict by the time named, and therefore improper, and a ground for a reversal.

In the quite recent case of *State v. Punshon*, 124 Mo. 448, the inviolability of the province of the jury was again referred to.

In *Insurance Co. v. White*, 58 Ark. 277, the facts in the case touching the point under discussion were these: "The bill of exceptions shows that on the morning after the jury had been permitted to separate, after having failed to agree, the court told the jury to retire and consider of their verdict, and said to them: 'If you can't each get exactly what you want, get the next best thing to it,'—which was excepted to, and made appellant's fifth ground in motion for new trial." And, when the cause reached the supreme court of Arkansas, that tribunal remarked touching this language of the trial court: "We can readily understand how the patience of trial judges may be put to crucial tests by the seeming obstinacy or obtuseness of jurors in failing to agree upon a verdict in a case which, to the judge, may appear of easy and ready solution. But nevertheless, under such circumstances, the court must suffer and endure; and, if it finds it necessary to give the jury additional instructions, let its language be circumscribed by the constitution (article 7. § 23), and such as not

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to indicate that the jury would be justified, under any circumstances, in bringing in a verdict merely for the sake of expediency. While not intended in that sense, evidently any juror might reasonably construe the above language to mean that he might yield his individual convictions of right, and agree with his fellows for the sake of agreeing, whether his judgment was convinced and his conscience satisfied or not. This was its most natural purport. 'The next best thing,' to some of the jurors, might have been a verdict for the appellee, when they really believed that he was not entitled to it."

In *Goodsell v. Seeley*, 46 Mich. 623, the court said: "The law contemplates that jurors shall, by their decisions, harmonize their views, if possible, but not that they shall compromise, divide, and yield for the mere purpose of an agreement."

Same—Cases
examined con-
tinued.

In *Randolph v. Lampkin*, (Ky.) 14 S. W. 538, the jury came in a body to the court room, and reported that there was no possibility of their agreeing; whereupon the trial judge arose from his seat, and addressed them as follows: "Gentlemen, how do you expect this case to be decided unless you do it? This is, as you know, the third trial of this case, and it has become an incubus upon the court. * * * You must decide it. * * * It is no credit to a man, merely because he has an opinion, stubbornly to stick to it, but he should be open to argument and reason and conviction." Much more was said of the same tenor. The jury were sent back, and finally brought in a verdict. And it was held by the supreme court of Kentucky that the use of such language was an unwarrantable interference with the province of the jury, and that the verdict should be set aside. The remarks of the court in that case quite closely resemble those in the case at bar. Indeed, the remarks of the court in this instance are even of a more objectionable character, because evidently aimed at and addressed to one man, and that one who had evidently stood out against the eleven who "could get together in about a minute." In one hour and a half from the time of the address a verdict was reached. On this state of facts there can be but one opinion as to the effect of the address. The juror who had stood out for what he deemed to be right surrendered his convictions, and joined the majority. Further comment is unnecessary.

We cannot sanction a verdict thus secured, although we do

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not impugn the motives of the learned judge who addressed the jury in the manner indicated. Still, it is necessary that there be no invasion in any respect or in the slightest degree of the province and functions of the jury.

This point alone affords a sufficient ground for a reversal of the judgment, and remanding the cause; but, on grounds already stated, the judgment should be simply reversed.

BURGESS, J., concurs in paragraph 4 of the opinion, and the judgment is accordingly reversed, and the cause remanded. GANTT, P. J., expresses his view in a separate opinion.

Dissenting opinion. GANTT, P. J. (dissenting).—In my opinion the judgment should be affirmed. The sufficiency of the petition is not challenged in the very able and elaborate brief filed for the defendant. Although containing 80 printed pages, the very able and astute counsel for defendant does not make the point that a cause of action is not stated in the petition, and, in my opinion, he would not have been justified in so doing.

The petition shows that plaintiff was a passenger on defendant's train at the time of his injuries. From that relation the law cast upon defendant the duty of exercising the utmost care that a very prudent person would have exercised under the same circumstances in providing careful and prudent servants to manage its train.

The petition further charges that in the car in which plaintiff was riding was a brakeman whose duty it was to act as porter in the passenger and caboose cars, call the stations, assist passengers on and off the cars, and give them information and assistance, and look after their safety and comfort. I entertain no doubt whatever of the correctness of the legal proposition that the act of the servant to bind his employer must be in the line of his duty to his master. But if a petition states the relation from which the duty necessarily flows, I think it is sufficient, without further formal averment.

From the averments, then, of this petition, it appears that defendant had placed a brakeman in its cupola or lookout in the caboose in which plaintiff was a passenger; that the brake rod extended up into this cupola; and that it was

the duty of the brakeman to work this brake, and call stations, and otherwise look after the safety of the passengers.

The petition then avers the fact that this train was preceded by another train only a short distance, and was followed by another.

It avers that, when about three miles from Butler, this brakeman was in this cupola, and the engineer gave the signal for "Down brakes"; that thereupon said brakeman instantly, excitedly, negligently, and recklessly called out "Jump!" or "Jump for your lives!" and plaintiff, knowing of the train just in front, and another just in the rear, started to get off of the train by the rear platform, and, not being able to turn to the steps, jumped, and fell to the ground, and was injured.

What, then, is the case made on paper? A passenger is in a car in sight of a part of the necessary appliances with which the train is operated. He sees the brakeman in charge thereof in the lookout, from which it is his duty to observe and obey signals for stopping or slowing that train. A signal is given for brakes to stop the train. There is nothing in the signal itself to excite fear or apprehension of danger, but suddenly this servant, upon whose conduct in part the safety of the train must depend, instantly, excitedly, and recklessly called out, in the hearing of this passenger, "Jump!" "Jump for your lives!" If there was an impending collision ahead with the forward train, and from his vantage ground he could see the danger, will any one contend it was not his duty to warn the passengers, if thereby the danger might be averted? We think, most clearly, the duty would be an incident of his employment. On the other hand, if, in fact, there was no danger, and his position certainly enabled him to see whether there was or was not, was it not negligence, for which his employer must be held liable, for him to so act and so conduct himself as to needlessly alarm those passengers who had not the equal opportunity of judging whether there was danger? And can his employer now be heard to say it is not liable when, by its own servant's conduct, a passenger was induced to jump from the train in the effort to save his life? I think the very manner of performing his duty was negligent, and his master must respond for it. I do not think it is necessary to cite authority. I think the principles are settled, and I differ from my brother only in their application.

2. The evidence of plaintiff and his witnesses fully sustained

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the petition. It is true there was a conflict between defendant's witnesses and plaintiff's on this point, but that was a question of fact and veracity, which was properly left to the jury; and there was no such failure of evidence as would have justified the circuit court in taking the case from the jury upon the demurrer to the evidence.

**Dissenting
opinion con-
tinued.**

3. Nor can I concur in the view that although Lamb, the brakeman, had authority to make the exclamation, "Jump for your lives!" and that it was uttered in the line of his duty, in the course and furtherance of his master's business, still no liability would attach to his employer, because there was no real danger.

The plaintiff was in the caboose—the rear car of the train—and his conduct must be measured by his opportunity to see and judge whether there was imminent danger. That he could not, from the interior of this caboose, see ahead, and know what the brakeman in the cupola, or the engineer who gave the signal, did, is very evident. There was, then, no equality as to their means of knowledge and observation. Under these circumstances, this alarm was given, and in direct and immediate connection with the call for brakes. Now, I understand the law of this state to be that, if one is placed in a position of peril by the recklessness or negligence of one who owes him the duty of safely carrying him, the propriety of an attempt on his part to escape apprehended danger is not to be measured by the judgment and discretion that would be required of him when not dominated by terror of impending danger. The defendant, having wrongfully excited his fears, cannot now be heard to say that plaintiff was guilty of negligence in adopting the dangerous alternative which the defendant's own servant urged him to take. *Siegrist v. Arnot*, 86 Mo. 200; *Adams v. Railroad Co.*, 74 Mo. 554, 7 Am. & Eng. R. Cas. 414; *Kleiber v. Railway Co.*, 107 Mo. 240, 52 Am. & Eng. R. Cas. 531.

In this last case it was said: "If, without having time to deliberate and act upon the instinct of self-preservation, and as a prudent person might be expected to act in the circumstances, he is injured by adopting a dangerous alternative, he may still recover from the one by whose negligence he has been impelled to act. This is true, though no injury would have resulted had no attempt to escape been made." *Bischoff*

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v. Railway Co., 120 Mo. 216; Coulter v. Express Co., 56 N. Y. 585.

I think it was a question for a jury to say whether a reasonably prudent man would not have jumped from that train when urged to do so by the servant in charge of the brake, who occupied a position from which he could readily discover danger, when they took into consideration the construction of a caboose, the signal for brakes, and that the urgency of the cry left no time for deliberation. I do not think this court should declare, as a matter of law, that plaintiff's conduct was so unreasonably rash that he cannot recover, because his fears had been needlessly aroused by defendant's servant in charge of the appliance for stopping the car. Three out of the four passengers were so alarmed that they jumped. On this point I fully concur in the opinion of the Kansas city court of appeals in Ephland v. Railroad Co., 57 Mo. App. loc. cit. 163, an action for injuries to another passenger who had jumped from this train when plaintiff did.

**Dissenting
opinion con-
tinued.**

4. I do not think the remarks of the circuit judge were so prejudicial as to constitute error. The court, I think, was moved simply by a desire to ascertain if there was any probability of reaching a verdict. He evinced no desire to force the jury into a verdict, and I think his remarks fall far short of a reproof of the one juror. I do not think his statement calls for a rebuke, much less a reversal.

BURGESS, J., concurs in my views, except as expressed in paragraph 4. As to that, he concurs with Judge SHERWOOD, holding the conduct of the circuit judge to be error.

Contributory Negligence A., T. & S. F. R. Co. v. Hughes

ATCHISON, TOPEKA & SANTA FÉ R. CO.

v.

HUGHES (Margaret).

(*Supreme Court of Kansas, July 6, 1895.*)

Inducing Passenger to Leave Moving Train—Violation of Duty by Company.—It is negligence on the part of a railroad company for those in charge of a passenger train to induce a passenger to leave the train while in motion, and a gross disregard of the duty it owes to him not to stop the train entirely, and give the passenger ample time and opportunity to alight. (*Page 253.*)

What Constitutes Contributory Negligence on Part of Passenger Leaving Moving Train [(1) pp. 257, 299].—It is not contributory negligence *per se* for a passenger to alight from a moving train; but the question as to whether the act constitutes negligence depends upon whether the danger was so obvious that a prudent person would not under the circumstances have made the attempt, and is to be determined by the jury upon a consideration of the rate of speed the train had acquired, the place, the conduct of those in charge of the train, and all the circumstances connected with the act of alighting. (*Page 253.*)

Same—Alighting from Train by Advice or Command of Conductor [(1) p. 299].—The mere fact that the passenger acts upon the advice or command of the conductor would not justify him in attempting to alight from the train when it was obviously dangerous to do so, and the fault of the conductor in this respect will not relieve the passenger from the consequences of his own reckless acts. But if the train is moving very slowly, and the passenger, upon the suggestion or request of those in charge of the train, attempts to alight, and is injured, it is a proper question for the jury whether it was a prudent or ordinarily careful act, or whether it was a rash and reckless exposure to peril and hazard. (*Page 255.*)

Same—What Inattention to Duty on Part of Passenger will Bar Recovery.—A slight inattention to duty, which is not the proximate cause of the injury, does not bar a recovery for injury to a passenger resulting from the ordinary or gross negligence of the railroad company. (*Page 253.*)

Action for Death of Passenger by Wrongful Act—Admissibility of Mortality Tables in Evidence.—While mortality tables are admissible in evidence to assist the jury in estimating the expectancy of life, they are not indispensable, and the jury may make their estimate from the age, health, habits, and the physical condition of the person at the time of his death. (*Page 257.*)

Same Excessive Damages [(1) p. 214].—In the absence of any evidence of partiality on the part of the jury, \$7830 is not excessive damages for the death of a man 40 years of age of good health and habits, and capable of earning \$42 per month. (*Page 257.*)

ERROR to district court, Osage county. *Affirmed.*

A., T. & S. F. R. Co. v. Hughes *Contributory Negligence*

This action was brought in the district court of Osage county by Margaret Hughes against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for the death of her husband, John Hughes.

The petition alleges, among other things, "that on or about one o'clock of the morning of March 20, 1890, the said John Hughes, in company with his relatives and friends, being at the station of Scranton, on the line of defendant's railroad, and being desirous of going to the station of Peterton, also on the line of defendant's railroad, purchased and paid for, from the ticket agent of defendant at Scranton, a ticket authorizing and empowering him to ride and journey upon a passenger train of defendant's then about to arrive at Scranton, on its journey to Peterton and points beyond; that in a short time thereafter said train arrived, and the said John Hughes went on board said train, and took passage for said station of Peter-
Case stated—
Petition.ton; that said train proceeded on its journey towards Peter-
ton; that the conductor of said train and in charge thereof took up the ticket of the said John Hughes, and was advised of the fact that said John Hughes and those with him were to get off at Peterton; that, as the train approached the station of Peterton, the conductor informed and gave said John Hughes and his friends who were with him to be informed that the train would not stop at Peterton, but would slack up speed so that they might leave the train at the station in safety, and that they must do so; that the train slackened its speed, and, in obedience to the commands, request, invitation, and solicitation of the said conductor, all the persons in company with the said John Hughes left the train at a place which the said conductor gave all of them to be informed and understand was the station of Peterton; that the said station of Peterton was unlighted; that the train had run past the station and platform, and was then, notwithstanding the speed had been slackened, running at a dangerous rate of speed to leave the train; that the said John Hughes, having but little experience in railroad traveling, and relying upon the said commands, requests, invitation, and solicitation of the said conductor, with all the others of his party, left the train, being deceived by the said conductor as to the place where they should alight, and by the darkness of the place, and as to the speed of the train; that the said John Hughes was the

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last to alight; that the conductor knew that they all intended to alight, and while alighting from the train, and then knew that it was dangerous to life and limb, and which the said John Hughes did not know, nor did he have reasonable means to know; that the whole party were hurried off the train by the conductor; that one of the party was severely injured, and the said John Hughes then received fatal injuries, from which he died in a few moments afterwards; that the said John Hughes was in the exercise of care at the time; and that his death was caused and produced by the negligence and carelessness of said conductor in not stopping said train at the platform and station of Peterton, and his criminal and willful negligence in compelling, commanding, requiring, inviting, and soliciting the said John Hughes to leave the train in the night-time at an unlighted station ground, at a speed known to be dangerous to him, and represented to be safe to said John Hughes to leave the train, and in the further negligence and carelessness of the defendant in not requiring the train to stop, in not by rule and order compelling its conductors to not put off passengers while trains were in motion, and in keeping an unlighted station at Peterton, and for all which negligence and carelessness the defendant is by law responsible and liable; that, at the time of his death, said Hughes was 40 years of age, the head of said family, supported wholly by his labor; and that, by reason of his death, his said next of kin and heirs at law have suffered and sustained pecuniary damage and loss by his death to the extent of \$10,000; and that this action is brought to recover the same for their exclusive benefit and use, as well as the sum of \$5000 for vindictive damages and smart money by reason of the gross acts of negligence of defendant heretofore recited, and for costs."

The answer of the defendant was a general denial and an averment of contributory negligence.

In the second defense, it is alleged that the injuries sustained by Hughes were wholly the result of his attempt to leave the train while the same was in motion, and
Answer. while he was under the influence of intoxicating liquor, and in a condition produced by the use of intoxicating liquor, such as to render him unable to safely alight from a train in motion.

No reply was filed.

The case was tried at the April term, 1890; and, upon the

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testimony, the jury found that John Hughes came to his death by reason of the negligence of the conductor and brakeman in failing to stop the train at the station of Peter-ton, and see him safely off. It was found that they required him to get off near the depot while the train was in motion and running at a dangerous rate of speed.

It was further found that he was 40 years of age; that his occupation was a coal miner; that he was capable of earning \$42 per month; and that he might be reasonably expected to earn such wages for a period of 25 years.

The general verdict was in favor of the plaintiff below, and the damages awarded were \$7830.

The railroad company brings the case here for review.

A. A. Hurd and *W. Littlefield*, for plaintiff in error.

Henry B. Hugbanks and *Frank A. Hay*, for defendant in error.

JOHNSTON, J. (after the foregoing statements).—The first contention of the railroad company is that, upon the pleadings, judgment should have been given in its favor.

The basis of this claim is that contributory negligence was set up as a defense in the answer of the railroad company, and that, as there was no reply or denial of the averment of contributory negligence, it must be taken as true.

Effect of failure of plaintiff to reply.

The petition alleged that the deceased was in the exercise of care when he attempted to alight from the train upon the order of the conductor, and the answer of the company contained a general denial of all the averments of the petition.

If any reply was necessary to close the issue, it appears to have been overlooked and waived by the parties, and to have been regarded as unnecessary by the court.

The parties evidently proceeded upon the theory that an issue had been fairly raised as to whether Hughes was in the exercise of due care when the fatality occurred. A great part of the testimony produced at the instance of the parties bore upon that question, and no objection was made by the railroad company that the pleadings were insufficient, nor that the absence of a reply entitled it to a judgment.

At the commencement of the trial, an objection was made to the admission of any testimony, but the ground of the ob-

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jection was that the petition failed to state sufficient facts to constitute a cause of action; and, at the end of the testimony offered to sustain the allegations of the petition, a demurrer to the evidence was interposed, which was overruled.

Neither of these objections called the attention of the court to the necessity or omission of a reply. In view of the conduct of the parties in the course of the trial, the objection that there was no reply comes too late, and cannot be heard for the first time in the supreme court.

The next contention of the railroad company is that the conduct of the deceased in attempting to alight from the train on a dark night, when it was in motion, was reckless negligence, although he may have been invited or commanded by the conductor to do so, and therefore the court erred in refusing the request of the defendant to instruct the jury to return a verdict in its favor.

On the night of March 19, 1890, John Hughes, his boy, who was about 11 years old, James O'Melia, his father-in-law, who was about 68 years old, and Alex O'Melia, his brother-in-law, about 26 years of age, boarded a regular passenger train of the railroad company at Scranton, for the purpose of riding to Peterton, a station about 12 miles away. Hughes and the elder O'Melia took seats near together, in the front end of a coach, while the younger O'Melia and the boy found seats in the rear end of the same coach. Alex O'Melia had procured the tickets for the party, and they were taken up by the conductor shortly after the departure from Scranton.

The testimony of the plaintiff below tended to show that, before reaching Peterton, the conductor told Alex O'Melia that the train would not come to a full stop at Peterton, but would only slow up for them to get off, when Alex responded that the train ought to be stopped, to enable the two older men, who were sitting at the front end of the coach, to get off, and in reply the conductor advised him to take care of himself, and let the others take care of themselves. It tended to show that after the whistle had been sounded for the station, and as they approached the station of Peter-ton, Hughes and James O'Melia were told that this was their station, and to get up and get off, which they proceeded to do. Alex O'Melia and the boy went out on the rear platform of the coach; and when they arrived at the station, and the train was running slowly, Alex took the boy in his arms, and

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jumped upon the platform. The conductor was on the platform of the next car, and inquired if all were off, when Alex told him that they were not. Nevertheless, the conductor gave a signal, and the train commenced to run faster. Alex walked a few steps along the platform, and found his father lying on his face and hands, and a little further along, and beyond the platform, the body of Hughes was found in a mangled condition. The arrival of the train was after midnight, when it was very dark, and the station was not lighted, nor was there any one in charge of the same.

It is true that the testimony offered in behalf of the railroad company is to the effect that the train came to a full stop at Peterton, and that they remained at the station between two and three minutes, giving ample time for passengers to leave the train. Testimony was offered to show that Hughes had been sleeping, and remained on the train until after they departed from Peterton, and that he jumped from the train after it had left the station, and while it was in motion. An effort was also made to show that he was somewhat intoxicated at that time.

Some of the circumstances developed in the case strongly tended to sustain the theory of the plaintiff, but the conflict in the testimony has been settled by the jury, and we must assume that upon all disputed questions, the facts are as the testimony of the plaintiff below would show. Accepting that offered in her behalf as true, the company was clearly guilty of culpable negligence. It is well settled that it is negligence on the part of a railroad company for those in charge of a passenger train "to induce a passenger to leave the train while in motion, and a gross disregard of the duty it owes to him not to stop the train entirely, and give the passenger ample time and opportunity to alight." *Filer v. Railroad Co.*, 49 N. Y. 51; *Bucher v. Railroad Co.*, 98 N. Y. 128, 21 Am. & Eng. R. Cas. 361; *Beach*, Contrib. Neg. 160, 2 Am. & Eng. Enc. Law, 761.

It is not contributory negligence *per se* for a passenger to leave a train which is in motion. Of course, a passenger must exercise ordinary care; and if he voluntarily places himself in a perilous position, and incurs a danger so obvious that an ordinarily prudent man would not encounter it, there can be no recovery. Whether the act of Hughes in leaving the train while it was in motion

Inducing passenger to leave moving train.

Contributory negligence.

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constitutes contributory negligence barring a recovery depends upon whether the danger was so patent that a prudent man, under the circumstances, would not have made the attempt. We think it was clearly a question of fact for the jury to determine.

According to the testimony of the plaintiff, the train was running slowly, and at such a diminished rate of speed the motion of the train may have been hardly perceptible. From the testimony it would appear that James O'Melia was unable to determine whether the train was actually in motion when he attempted to alight. The fact that there was no light at the station made it the more difficult to decide as to the motion of the train and the danger of leaving it. Then he would naturally think that the train would be brought to a stop, and the conductor would not invite him to leave the car when it was unsafe to do so. Of course, the mere fact that he acted upon the advice or command of the conductor would not justify him in attempting to alight from the train when it was obviously dangerous, and the fault of the conductor would not relieve the passenger from the consequences of his own reckless acts. "When, however, the passenger, under the encouragement or instruction of the company's servants, makes the leap, and suffers an injury therefrom, such an act on the part of the passenger is not generally held contributory negligence; but when the passenger leaves the train voluntarily, even though at the suggestion of the conductor or other trainmen, while the train is in motion, it is a question for the jury whether he acted as a prudent man under the circumstances." Beach, Contrib. Neg. § 148.

In the Filer case, already cited, the following language is used: "That there was more hazard in leaving a car while in motion, although moving ever so slowly, than when it is at rest, is self-evident. But whether it is imprudent and careless to make the attempt depends upon the circumstances: and where a party, by the wrongful act of another, has been placed in circumstances calling for an election between leaving the cars or submitting to an inconvenience and a further wrong, it is a proper question for the jury whether it was a prudent and ordinarily careful act, or whether it was a rash and reckless exposure of the person to peril and hazard." See, also, *Railroad Co. v. Crunk*, 119 Ind. 542, 41 Am. & Eng. R. Cas. 158; *Nichols v. Railway Co.*, 68 Iowa 732, 27

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Am. & Eng. R. Cas. 183; Carr v. Railroad Co., 98 Cal. 366; Odom v. Railroad Co., 45 La. Ann. 1201; Carruth v. Railroad Co., Id. 736; Cousins v. Railroad Co., 96 Mich. 386, 2 Am. & Eng. Enc. Law, 762, and cases heretofore cited.

If the conductor hustled Hughes and the other passengers from the cars at Peterton, in the darkness, as the witnesses for the plaintiff below have stated, he was certainly guilty of gross negligence, when it was his duty to exercise the highest degree of reasonable care in safely setting them down at the station; and, under the authorities which have been cited, it was clearly a question for the jury to determine whether Hughes was in the exercise of ordinary care when he obeyed the order of the conductor, and attempted to alight from the train.

Facts showing
contributory
negligence.

Some objections are made to the answers given by the jury to the special questions submitted, but we find nothing substantial in them. In response to one question, the jury answered that the body of Hughes was found from 60 to 90 feet below the south end of the depot, while most of the testimony fixed the point at about 120 feet from the depot. We do not deem the answer to be of much importance, but an examination of the testimony shows that the witnesses only estimated the distance, and did not undertake to give the exact measurement. We think there was testimony to sustain the findings that were made, and we can see no such inconsistency in the findings as will justify a reversal.

It is next insisted that the court erred in its instructions to the jury by requiring the application of the rule of comparative negligence, instructing in regard to gross negligence, and in other respects in the giving and refusing of instructions. The court in its charge stated the rules which govern where there is mutual or concurring negligence. It also recognized different degrees of negligence, and in doing so, to some extent seemed to place the gross negligence of the company against the slight negligence of the deceased.

Inattention to
duty on part
of passenger.

Evidently, the trial court had in mind some of the decisions of this court where it is held that a slight inattention to duty, which is not the proximate cause of the injury, does not bar a recovery for injury resulting from the negligence of another. Although some of the language employed was objectionable, it is clear that the court did not indorse the doctrine of

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comparative negligence, nor give the jury to understand that, if Hughes was guilty of ordinary negligence contributing to his death, there might be a recovery, because the company was guilty of greater negligence. The passenger is required to exercise ordinary care, and his failure to exercise the highest or extraordinary care will not preclude a recovery for an injury caused by the gross or ordinary negligence of the railroad company. It is conceded that extraordinary care is not required of a plaintiff who brings an action of negligence, and that slight negligence on his part will not defeat a recovery.

In the case of *Railway Co. v. Peavey*, 29 Kan. 180, cited by plaintiff in error, it is said that "it is settled in this state that a party may recover for injuries done to him or his property caused by the negligence of another, even if his negligence is slight." While this view was adopted, and degrees of negligence were recognized, at the same time the court plainly instructed the jury, and kept it before them throughout the charge, that, if Hughes failed to exercise ordinary care and prudence in jumping from or leaving the train, there could be no recovery for his death. Taking all the instructions together, we think the jury was not misled by the language of the court which is complained of, and that, under the decisions, it cannot be held that prejudicial error was committed in charging the jury as to the care required of the company and of the deceased. *Railway Co. v. Rollins*, 5 Kan. 167; *Sawyer v. Sauer*, 10 Kan. 466; *Railway Co. v. Pointer*, 14 Kan. 37; *Railway Co. v. Young*, 19 Kan. 488; *Railway Co. v. Richardson*, 25 Kan. 391; *Railway Co. v. Peavey*, 29 Kan. 170; *Railway Co. v. Henry*, 36 Kan. 565, 14 Pac. 1.

The testimony which was introduced warranted the court in stating the rule of gross negligence to the jury, and, after an examination of the entire charge, we are satisfied that the remaining objections to the rulings upon the instructions given and refused are not substantial, nor can error be predicated on them.

The final objection is that the damages allowed are excessive. According to the testimony, Hughes was 40 years of age, a man of good habits, with good health and a sound body. He was an industrious man, who had been engaged in mining, and who had earned wages as high as \$5 per day; and the jury found that in his usual vocation he was capable

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of earning \$42 per month, and his earnings were computed for a period of 25 years.

It is said that no mortality tables were introduced to show the probable duration of the life of the deceased. Such tables are admissible in evidence, to assist the jury in estimating the expectation of life, but they are not indispensable. The jury may make their estimate from the age, health, habits, and the physical condition of the person at the time of his death.

Admissibility
of mortality
tables.

The court cannot interfere with the verdict of the jury upon the ground of excessive damages, unless they are so great as to appear to have been given under the influence of partiality or prejudice. Although the amount awarded was liberal, we cannot disturb the judgment on the ground of excessive damages.

Excessive
damages.

The judgment of the district court will be affirmed.
All the justices concurring.

ABSTRACTS OF RECENT DECISIONS

(1) p. **Jumping from Moving Train—Contributory Negligence.**—In *Atchison, Topeka & S. F. R. Co. v. O'Melia*, (Kan., 1895) 41 Pac. Rep. 437, the court said: "The cause of action, and the cause of action in the case of *Railroad Co. v. Hughes* (decided by the supreme court of Kansas on July 6, 1895), *ante*, p. 248, both originated at the same time, and both out of the same failure of the train on which the parties were passengers to stop at its station at Peterton. Each party leaped from the moving train. Hughes was killed, and suit was brought by his widow for the recovery of damages for wrongfully and negligently causing his death. O'Melia was injured, but survived. The cases were both tried in the same court, before the same judge, one on the 13th day of November and the other on the 14th of November. The same instructions were given in both cases in relation to the question of negligence. Hughes recovered judgment for over \$2000, and the case was decided by the supreme court. O'Melia recovered less than \$2000, and this case was duly certified down by the supreme court to the appellate court for its decision. The construction put upon the instruction of the trial court by the supreme court is followed in this case."

Same.—It is negligence on the part of a passenger to alight from a moving train. *Victor v. Pennsylvania R. Co.*, 164 Pa. St. 195, *citing Railroad Co. v. Aspell*, 23 Pa. St. 147; *McClintock v. Railroad Co.*, 21 Wkly. Notes Cas. 133.

Same—Same—Test as to Negligence.—The true test as to whether
2 (N. S.) A. & E. R. Cas.—17

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alighting from a moving train was negligence or not is whether the conduct of the person injured was that of an ordinarily prudent person. *Jacob v. Flint & P. M. R. Co.*, (Mich.) 63 N. W. Rep. 502.

Same—Same—*Jumping Off in the Dark.*—A passenger who jumps from a rapidly moving train at night, when it is so dark that he cannot see where the jump will land him, is guilty of such negligence as will preclude a recovery. *Rothstein v. Pennsylvania R. Co.*, 33 Atl. Rep. 379.

Same—Same—*Failure to Look for Approaching Train.*—A person leaving a slowly moving train in the night-time who fails to look for a train approaching from the opposite direction is not guilty of contributory negligence as a matter of law in the absence of evidence that he saw the train or knew that it was approaching. *McDonald v. Kansas City & I. R. Co.*, (Mo.) 29 S. W. Rep. 848; *distinguishing Weber v. R. Co.*, 100 Mo. 198, 41 Am. & Eng. R. Cas. 117.

Same—Same—*Boy Helped Off Train by Passenger.*—Although a railroad company is negligent in failing to stop its train a reasonable length of time for its passengers to disembark and in failing to provide reasonable and proper facilities for that purpose, yet if a boy four years of age, traveling with his mother, sustains no injury by reason of that negligence, but receives injuries by being helped or dropped from the car by a passenger on the train, after it had started to move, and the act of such passenger in putting the child off the moving train was not such an act as might reasonably have been anticipated under ordinary circumstances from the negligent act of the company as a natural and probable result thereof, then the act of such third person is an independent cause of the injury, and the company is not liable therefor. *Texas & P. R. Co. v. Beckworth*, (Tex. Civ. App.) 32 S. W. Rep. 347.

Same—Same—*Failure to Request Driver of Street Car to Stop.*—It appearing by the evidence that although a passenger had requested the driver of a street car to stop at a designated place, and had received a rude and profane answer, yet, upon failure of the driver to stop, he had jumped from the car while it was in motion, and without again requesting the driver to stop, or notifying him of his purpose then to alight, and it not appearing that the driver, when he struck the team, knew that the plaintiff was attempting to alight, or that there was any such emergency as would justify the plaintiff in alighting from the moving car, the court committed no error in granting a nonsuit. *Outen v. North & South St. R. Co.*, 94 Ga. 662.

Same—Same—*Passenger on Wrong Train by Negligence of Company.*—The negligence of a railroad company in causing a person to go upon a wrong train will not excuse negligence on his part in alighting from a swiftly moving train. *Rothstein v. Pennsylvania R. Co.*, (Pa.) 33 Atl. Rep. 379.

Same—Same—*Duty of Company—Degree of Care—Instruction.*—It

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is error to instruct the jury as to the degree of care due by a horse-railway company to a passenger who alights from a moving car that "the defendant was bound to so control the speed of the car as to insure" the safety of the passenger. *New Jersey Traction Co. v. Gardner*, (N. J.) 31 Atl. Rep. 893.

Same—Same—Failure to Allow Passenger Sufficient Time to Alight.—Railroad trains should be stopped to afford passengers necessary time to get off at their destinations; and if a passenger is injured in attempting, under the directions of the conductor, to alight at his station from the moving train, the railroad company will be responsible for the injuries. *Citing* 2 Harris Dam. Corp. § 596; *Lehman v. Railroad Co.*, 37 La. Ann. 705; *Odom v. Railroad Co.*, 45 La. Ann. 1204. *Jones v. Texas & P. R. Co.*, 47 La. Ann. 383.

(2) **Same—Same—Exception to Rule—Leaving Train by Direction or Invitation of Train Hands.**—To the rule that a passenger is guilty of negligence in alighting from a moving train there are well-recognized exceptions, as where the passenger leaves the train by direction of the company's agents, or is placed in peril through their neglect, or is in the act of alighting and cannot retrace his steps, and others in which the question of negligence is to be determined by the jury. *Victor v. Pennsylvania R. Co.*, 164 Pa. St. 195; *Johnson v. Railroad Co.*, 70 Pa. St. 357; *Railroad Co. v. Lyons*, 129 Pa. St. 113, 41 Am. & Eng. R. Cas. 154.

Same—Same—Same.—A passenger is guilty of contributory negligence in jumping from a moving train unless invited to do so by the train hands and the attempt is not obviously dangerous, and neither the fact that the conductor failed to stop the train as he promised, nor the anxiety of the passenger to see a sick child, will excuse the negligence. *Burgin v. Richmond & D. R. Co.*, 115 N. Car. 673, *citing* *Broune v. Railroad Co.*, 108 N. Car. 34, 47 Am. & Eng. R. Cas. 544; *Lambeth v. Railroad Co.*, 66 N. Car. 494; *Walker v. Railroad Co.*, 41 La. Ann. 795, 41 Am. & Eng. R. Cas. 172; *Jewell v. Railway Co.*, 54 Wis. 610, 6 Am. & Eng. R. Cas. 379; *Railroad Co. v. Morris*, 31 Grat. 200; *Nelson v. Railroad Co.*, 68 Mo. 593; 2 Wood Ry. Law 1133.

Same—Same—Same.—Upon the announcement of a station, plaintiff, a female passenger, walked to the front platform of the car and at the suggestion of the brakeman crossed the platform to the next car. The train stopped to let a train out of the station, but again started, when, supposing the train was leaving the station, she spoke to the conductor and the brakeman, but failing to attract their attention, stepped from the car to the station platform, and, realizing her danger, she grasped the railing of the car and went off backwards. *Held*, that she was guilty of such negligence as precluded a recovery. *Victor v. Pennsylvania R. Co.*, 164 Pa. St. 195.

Same—Same—Calling Out Station—Experience in Railroad Travel.—A girl 18 years of age, with experience in traveling on railroads,

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who on hearing a station called out proceeds to the car platform, and, believing she has passed her station, steps from the car while it is moving at a rate of about four miles an hour, is guilty of contributory negligence, although a brakeman was standing on the platform at the time. *Jacob v. Flint & P. M. R. Co.*, (Mich.) 63 N. W. Rep. 502.

Same—Same—Sufficiency of Petition.—A petition averring that plaintiff, a passenger on a railroad train, requested the conductor to stop at a point where passengers were usually let off by request; that when the train reached the point, which was a safe place to get off, it slowed a little, and after passing the point in question, and while the train was in motion, an employé directed him to get off; and that, it being very dark, and being led to believe that he was at the point where he desired to get off, he did get off, and sustained the injury complained of, is defective because failing to show that the injury was caused by reason of his alighting from the train at an unsafe or dangerous place, or that his getting off in the dark and under the circumstances surrounding him was not obviously dangerous, and his own conduct reckless and imprudent. *Durham v. Louisville & N. R. Co.*, (Ky.) 29 S. W. Rep. 737.

Same—Same—Same.—Although a declaration does contain some loose allegations that the plaintiff was injured by the negligence of the employés of a defendant railway company in certain specified respects, but shows clearly by other allegations that this negligence was not the real cause of the injury; and the true meaning of the declaration, taking together all of its averments, and fairly construing them, is that the negligence which did cause the injury was that of a flagman in ordering the plaintiff to alight from a moving train in the dark at an unsafe place, and this being the plaintiff's real cause of action, if he had any at all, and the declaration failing to allege that the flagman had any authority to give such order, or that the giving of it was within the scope of his duties, or that he gave it by direction of the conductor, it was held that no cause of action was set forth, and that a demurrer to the same should have been sustained. *Savannah, F. & W. R. Co. v. Wall*, (Ga.) 23 S. E. Rep. 197.

Same—Same—Setting aside Verdict.—Even if the evidence introduced upon the trial was sufficient to show that the flagman, under instructions from the conductor, in fact had authority to see to the plaintiff's alighting from the train, and accordingly to give him the order to do so, and even if the giving of the order was, under all the circumstances, negligence, the verdict cannot stand. The declaration not setting forth a complete cause of action, the trial and its results were mere nullities. *Savannah, F. & W. R. Co. v. Wall*, (Ga.) 23 S. E. Rep. 197.

Same—Same—Instruction.—In an action for personal injuries sustained by alighting from a moving train it is not error to instruct the jury that if plaintiff, under the circumstances stated, voluntarily got

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out of a car upon the steps while the train was in motion, and voluntarily got off, or "deliberately" jumped off, or was even thrown off by the motion of the car and thereby injured, he was guilty of contributory negligence, and could not recover. *Hoehn v. Chicago, P. & St. L. R. Co.*, 152 Ill. 223.

Same—Same—Same.—Modifying an instruction stating as a proposition of law, that the alighting of a passenger from a moving train constitutes contributory negligence, by making the question of negligence depend upon the fact whether or not the train had stopped a reasonable length of time to allow passengers exercising reasonable care and diligence to get off the train, is not erroneous. *Chicago & A. R. Co. v. Byrum*, 153 Ill. 131.

Same—Same—Same.—In an action by a minor for injuries sustained while leaving a moving train, an instruction which in effect authorizes the jury to find for the plaintiff if his mother, who was traveling with him, was injured while getting off the train in the exercise of ordinary care, is erroneous. *Texas & P. R. Co. v. Beckworth*, (Tex. Civ. App.) 32 S. W. Rep. 347.

Same—Same—Same.—In an action to recover for personal injuries sustained by alighting from a moving train, it appeared that the accident occurred about half past 2 in the daytime; that plaintiff was in full possession of all his faculties; that he was not invited or instructed by any of the train employes to alight from the moving train; that there was nothing to divert or distract his attention, or to cause him to act under any sudden impulse, or under apprehension of impending peril; and that there was no necessity, or even occasion, for his alighting from the moving car, except to avoid the slight inconvenience of being carried past his destination, and it was held, that an instruction "that, if this accident occurred while plaintiff was in the act of getting off the car while it was in motion, then he cannot recover," was correct. *Butler v. St. Paul & D. R. Co.* (Minn.) 60 N. W. Rep. 1090.

The court said: "It is entirely clear from the record that what the court meant, and what the jury must have understood him as meaning, by 'getting off the car,' was, not going upon the steps of the platform but jumping or alighting from the steps to the ground." * * * "The act was purely voluntary, and not done under any exceptional or peculiar circumstances. Furthermore, as plaintiff could have 'struck the ground' but once upon leaving or getting off the car, it necessarily follows that if, instead of being thrown down by the jerk of the train, as he claims, he voluntarily alighted from the car, the place where he thus alighted must have been where he 'struck the ground,' which, according to his own testimony, was at least 150 feet beyond the station, where there was no platform, and where he would have to jump from the car step to the level of the ground. The great contention of counsel is that, even if plaintiff voluntarily alighted, the court was not justified in holding that this was negligence *per se*, because there was evidence tending to prove that the train was 'moving very slow,' 'coming to a perfect standstill,' 'almost to a stop.' Whatever the evidence may tend to show as to the previous speed of the train, there is none tending to

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prove that it was moving at such slow rate of speed when plaintiff reached a point 150 feet past the station, where, if at all, he attempted to alight. On the contrary, the physical fact (admitted by plaintiff himself) that, after he 'struck the ground,' the momentum which he had acquired from the forward motion of the train carried him 'a rod or such a matter,' demonstrates that the train must have been moving at a considerable rate of speed. It seems to us that there is no room for any other conclusion, among men of reasonable intelligence and prudence, than that to attempt to alight from a moving train under such circumstances was negligent almost to the verge of recklessness."

Same—Same—Sudden Increase of Speed.—A passenger on a railroad train with a ticket for a station at which it is not customary for the train to stop, but at which it merely slows its movement so as to allow its passengers to alight, will be entitled to damages, if, upon being called to the platform by the announcement of the station, he is thrown from the platform of the car and injured, his fall being caused by the sudden increase of the speed of the train. *Brasher v. Houston Cent. A. & N. R. Co.*, 47 La. Ann. 735.

Same—Same—Injury by Train Moving in Opposite Direction—Sufficiency of Evidence.—Where there is testimony from which it might be inferred that a person killed by a train going in the opposite direction, and of which he had no knowledge, was induced to get off the train while in motion at the particular time and place of the casualty by the advice and direction of the conductor, there is sufficient to go to the jury on the question of negligence of the company. *McDonald v. Kansas City & I. R. Co.*, (Mo.) 29 S. W. Rep. 848.

Same—Same—Passenger on Wrong Car.—Although an employé of a train on informing a passenger that he has taken passage in the wrong car also informs him that the car was moving slowly and that he could leave it, no liability is imposed on the company for injuries sustained by the passenger in negligently jumping off. *Rothstein v. Pennsylvania R. Co.*, (Pa.) 33 Atl. Rep. 379.

Same—Same—Passenger on Platform of Car—Province of Jury.—A passenger was informed by a brakeman that a stoppage was not ordinarily made at his station, but that he could leave the train at a crossing where a stop would necessarily be made. When the train was within a mile of the crossing, in obedience to the direction of the brakeman, the passenger left the car, took a position upon the rear platform of the car ahead, taking firm hold of the railing, and while so standing and awaiting the stoppage of the train, he was thrown from the car by the application of the air brakes and sustained the injuries complained of. *Held*, that the question of the contributory negligence of the plaintiff was for the jury. *Baltimore & O. R. Co. v. Meyers*, (U. S. Cir. Ct. App., 7th Cir.) 62 Fed. Rep. 367.

Same—Province of Jury—Whether or not a passenger is guilty of such contributory negligence in alighting from a moving train as will bar a recovery is a question of fact, to be determined by

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the jury, under all the attendant and surrounding circumstances. Chicago & A. R. Co. v. Byrum, 153 Ill. 131, *citing* Railroad Co. v. Bonifield, 104 Ill. 223, 8 Am. & Eng. R. Cas. 493; Railroad Co. v. Haskins, 115 Ill. 300; Railroad Co. v. O'Connor, 119 Ill. 586; Railroad Co. v. Brown, 123 Ill. 162.

TEXAS & PACIFIC RAILWAY CO.

v.

MCLANE (H. L.).

(Court of Civil Appeals of Texas, June 19, 1895.)

Injury to Passenger—Contributory Negligence [(1) p. 299].—A passenger of mature judgment encumbered with two valises, who, in alighting at a place near a station platform, is required to jump, in order to avoid a ditch, is not guilty of contributory negligence from injuries resulting therefrom, where it is shown that other passengers had likewise jumped in the presence of the conductor, who was hastening the disembarkation of passengers. the train being somewhat late. (Page 264.)

Duty of Carrier to Provide Suitable Stational Facilities [(1) pp. 279, 283].—It is the duty of a railroad company to provide reasonably safe and suitable station facilities to allow its passengers to get on and off its cars in safety. (Page 264.)

APPEAL from Bowie county district court. *Affirmed.*

F. H. Prendergast and T. Armistead, for appellant.

James Turner and J. Henry Shepperd, for appellee.

LIGHTFOOT, C.J.—This suit was brought by appellee for damages for injuries received by him as a passenger on defendant's train at Grand Cane, on the line of defendant's road, while attempting to alight from one of its passenger cars. After general answer, there was a plea of contributory negligence. There was a recovery for plaintiff, from which the railway company appeals. Case stated.

The following conclusions are reached from the evidence: On February 13, 1892, appellee was a regular passenger on one of appellant's passenger trains from Shreveport to Grand Cane. There were two coaches in the train, and he was in the rear coach. The train reached Grand Cane about 7 o'clock A.M., a little behind time. Appellee was ready to get off as soon as the train stopped, but, before Facts.

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he could get on the platform of the car, the conductor hallooed "All aboard," and the passengers were hurried out. The train was not stopped so that the car would be at the regular depot platform. At the place where the train stopped, and where the servants of the defendant company made arrangements for the passengers to disembark, they had negligently failed to make any suitable or safe platform or other safe arrangements for such disembarkation, and, in attempting to alight from the car at such place, as directed, appellee used all proper and necessary care on his part, and, without his fault or contributory negligence, he fell, and was injured to the full amount found by the judgment below.

The only two assignments in appellant's brief present the question of contributory negligence on the part of appellee.

Duty to provide proper stations.

We consider this question settled by the facts. It is well settled, and appellant in its brief seems to concede, that it was the duty of the company to provide reasonably safe and suitable station facilities to allow its passengers to get on and off its cars with safety. Its failure to contest the issues left the questions of appellant's negligence, and the amount of the damage, uncontroverted.

It is contended that appellee was guilty of contributory negligence, because he was a man of mature judgment, it was

Alighting from train—Contributory negligence.

in the daytime, he was familiar with the station, could see the danger, was not induced to make the step, was encumbered with two valises, other passengers alighted with safety, he did not ask assistance, or that the car be pulled up to the platform, and he did not go through to the front car and get off. None of these grounds are believed to be well taken. It was shown that the train was a little behind time, and the conductor was on the ground, hallooing "All aboard," as the passengers hurriedly got off. Several passengers preceded appellee, and, as they also had to jump from the steps obliquely, to avoid a ditch just opposite the steps, the conductor was present, and gave his sanction of this, the only means of exit from the car, it seemed to appellee to be reasonably safe, and, under the circumstances, it was not contributory negligence for him to attempt to alight in that manner. The two small valises—one of five, and the other ten, pounds—could not have had any material effect upon the question.

We find no error in the judgment, and it is *affirmed*.

ILLINOIS CENTRAL R. CO.

v.

DAVIDSON (Wilbur F.).

(United States Circuit Court of Appeals, 7th Circuit, Nov. 27, 1894.)

Injuries at Stations—Injury to Passenger While Leaving Railroad Premises [(1) p. 279]—Contributory Negligence [(1) p. 299]—Instructions.—In an action by a passenger for injuries sustained by being struck by a train while leaving the railroad premises, an instruction that if plaintiff, at the time of alighting, knew, or had good reason to know, from his past experience—if any he had—of the dangers that menaced him, he could not recover, but that if he did not have such experience he would not be guilty of contributory negligence, is erroneous where there is no dispute but that plaintiff had never been at the place of the injury before, and also because the instruction failed to tell the jury that if the want of ordinary care and prudence upon the plaintiff's part contributed materially to produce the injury, he could not recover. (*Page 271.*)

Same—Same.—A passenger leaving railroad premises, after alighting from a train, who, instead of making his exit at the place provided for that purpose, unnecessarily exposes himself to danger and is thereby injured, cannot hold the company liable for the injuries so received. (*Page 272.*)

ERROR to the United States circuit court for the northern district of Illinois.

Judgment reversed.

This is an action brought by Wilbur F. Davidson, the defendant in error and plaintiff below, against the Illinois Central Railroad Company, to recover damages for a personal injury to the plaintiff, the result of an accident happening upon defendant's road in the city of Chicago, on February 27, 1893.

The plaintiff was a citizen of Michigan, and resided at Port Huron, in that state. He was engaged in the business of selling on commission various kinds of electrical apparatus for the General Electric Company of New York. In the latter part of February, 1893, he came to Chicago, with a Mr. Annesley, for the purpose of showing him a certain electric plant in active operation, of the kind sold by plaintiff, situated at Hyde Park, in Chicago, near the line of the defendant's railroad. Mr. Annesley was an expert

Facts.

Injuries at Stations**Illinois C. R. Co. v. Davidson**

for another company, who wished to buy an apparatus. On arriving at Chicago, Davidson, the plaintiff, arranged with John L. Martin, a friend of his, residing in Chicago, and engaged in the same business, to go with plaintiff and Annesley to Hyde Park, to examine this plant. They all embarked at Van Buren street on a suburban train belonging to the defendant at about 5.45 o'clock on the evening of February 27th, and reached Hyde Park station at 6.10 p.m. The accident happened after the plaintiff and his party had left the car at Hyde Park.

The railroad company, pursuant to an ordinance of the city, had, shortly previous to this time, been engaged in raising its tracks at this point, of which they had had theretofore six in use. The four most easterly of these had been raised to a height of nineteen feet above the city datum, by substantial earth embankments. Trains were running on all of these four tracks. The road ran at this point north and south. The most westerly of these four tracks was the regular south-bound suburban track, and over which the plaintiff passed. The next most westerly track was the north-bound suburban track. The third track, counting from the west, was for south-bound through passenger and freight trains, and the most easterly track was for north-bound through passenger and freight trains. The two other tracks lying west of these four had not been raised, and were not then being used. A platform, 230 feet long, had been provided by the company for the use of passengers on the west side of the track over which the plaintiff passed, leading down north by a pair of stone stairs into Fifty-third street. This platform and stairs were built and intended for the use of passengers landing at Hyde Park from these suburban trains. There was no platform on the east side of the track intended for passengers. There was planking, however, placed between the different tracks, and east of all was a platform ending in an incline leading down to the level of the street, for the purpose of carrying baggage to and from the through trains. The evidence of plaintiff, however, showed that people living on the east side of the tracks were in the habit of getting off on that side and crossing the other tracks, and some of the evidence tended to show there were stairs not far distant on that side, where

passengers descended to the street. This was denied by the witnesses for the defendant.

On the arrival of the train at Fifty-third street, about dark, Mr. Davidson and his friends got off on the east side, and crossed over track No. 2, and started to walk north upon the planking between that track and

Facts continued.

No. 3. For some cause, not explained, Martin and Annesley got off a little sooner than Davidson, and Davidson lost sight of them. He says, after alighting there were people between them and him, and he could not see them; that he stepped out of the car on the platform at the north end, and looked to the right and left, and did not see them, and that a trainman, or person in uniform that he took for a trainman, standing right opposite to him on the platform of the next car, seeing him, plaintiff, hesitate, said, "This way," or "Down here," or "This side," by which plaintiff understood the man to mean that his friends had gone that way; that he saw other people getting off there, and that he got off upon the ground, looked up and down to see there was no train coming, and then crossed over one track upon the planking between two tracks,—the first one he came to; that he looked up, and saw people going north, and among them his two friends, and that he walked rapidly along in that direction; that there was no platform there on that side, but only a board or plank walk on a level with the other tracks; that he walked a short distance, when a freight train came up from the north, on his right side, and that a little after he felt he had been hit, and lost consciousness. The train that struck him, however, was not the freight train which he saw going south, but a suburban passenger train from the south on track No. 2, west of him on his immediate left, and which he had just crossed. He was knocked down, receiving a blow on the head, and other injuries, and was taken by his friends to a drug-store near by, and from there back to the city that night.

The evidence shows that these railroad tracks were 13 feet apart from centre to centre; that the width of the suburban coaches, as well as the freight cars, was 8 feet 8 inches, outside measurements; that two such cars, passing each other, would leave a space between them of 4 feet 4 inches; that the planking between the tracks, upon which the plaintiff was walking while injured, consisted of five 1-foot planks,

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laid parallel with the tracks; that the distance between the east rail of the north-bound suburban track and the west rail of the south-bound through track, on which the freight train passed, was 7 feet 11 inches; that there was a space of about 9 inches between the edge of the planking and the rail on either side; and that the planking was laid on about the same level with the tracks.

The evidence of defendant tended also to show that this planking laid between the tracks was placed there for the convenience of passengers arriving on the north-bound suburban and the south-bound through tracks in getting from their respective trains to the platform and stone steps on the west side of all the tracks, and leading down through the stone abutment to Fifty-third street. These are the main facts, so far as seems necessary to state them for the proper understanding of the points of law.

Sidney F. Andrews (*James Fentress*, of counsel), for plaintiff in error.

Edward R. Woodle, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge (after the foregoing statement). There were a great many exceptions taken by the defendant to the introduction of evidence upon the trial, as well as to the charge of the court, and to refusals to give special instructions, but it will be unnecessary to notice them all.

One of the principal contentions on the part of the plaintiff in error is that the case was submitted upon issues not raised by the pleadings, and that under the allegations of the declaration there could be no recovery upon the evidence submitted. But we think there is no substantial variance between the pleadings and proofs which should prevent a recovery. The negligence on the part of the company, if there was any, consisting in constructing its tracks, and planking between, and running trains in such a way that the cars of passing trains would extend upon either side over the edge of the planking, so that in running their trains, as was done in this case, one on each side of the walk or planking, it left a space of only four feet and four inches between passing trains for passengers

Contentions
stated and
examined.

to walk upon, so that a passenger, to avoid being struck, must take care to keep near to the centre of the planking; also in permitting or directing passengers to alight upon the east side of the track in the night time, where there was no depot or platform provided for them, and where trains were frequently passing each way, so that the passenger, unless very cautious, would be in great danger of being hit by a passing train. The evidence in this case showed that not only the plaintiff, but Annesley and Martin, were struck by one or other of those two trains, which were passing at the time they were endeavoring to make their way between the tracks. The plaintiff was seriously injured, the other two but slightly.

But the company was not misled by any variance between the pleadings and proofs. In fact, we think the declaration, containing, as it does, the following and other similar allegations, is all that it need be to admit the evidence:

“ And it then and there became and was the duty of the said defendant to provide reasonably safe means at its said Hyde Park station, whereby the said plaintiff could leave the train and premises of the said defendant without unnecessary or unreasonable hazard or injury to his person; but the said defendant, disregarding its duty in that behalf, carelessly, negligently, and wilfully, then and there, at, to wit, its said Hyde Park station, provided means for leaving its said train and premises that, as the said defendant well knew, were grossly unsafe and inadequate in this, to wit: It then and there provided a narrow platform of the width, to wit, of four feet, between two of the tracks of its said railway, and close to, to wit, within one foot of, the rails thereof, on either side of said platform, for its passengers and the said plaintiff to go and walk upon in leaving the train aforesaid, at, to wit, its said Hyde Park station, which platform was of insufficient width to permit passengers to be or walk thereon with reasonable safety from injury from passing trains, and was so constructed that the defendant's engines and trains running upon its two tracks last mentioned, in passing by the said platform on either side thereof, extended, to wit, six inches over the said platform, leaving an unreasonably insufficient and narrow space for the defendant's passengers upon said platform between such trains when so passing each other, of but, to wit,

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pleading.

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three feet in width; and also permitted and caused its servants in charge of its said trains to manage and drive the same in approaching and passing the said platform at frequent intervals and at a rapid and dangerous rate of speed, and by reason of the said grossly and inadequate and unsafe means so afforded its passengers and the plaintiff, as aforesaid, the said defendant then and there exposed its passengers and the said plaintiff upon the said platform to great and imminent danger of being struck and injured."

If the planking between the tracks was intended for the use of passengers to walk between trains passing in opposite directions, as was done in this case, it seems quite evident that the construction was faulty, or that the running of trains extending over the planking, while passengers were walking on it, was gross negligence. But the contention of the company was that this planking was not intended for any such use, but was for the convenience of passengers in crossing the tracks when there were no trains running, in order to reach the platform and steps on the west side, built expressly for the use of passengers in leaving these trains. For such a purpose there was no evidence tending to show that the planking was not entirely adequate. It was only when passengers attempted to walk lengthwise on the planking while trains were coming along that the danger arose.

Another exception and assignment of error relates to the evidence upon the matter of damages. The declaration did not contain an allegation of special damage, and the plaintiff on the trial was permitted to testify, against the defendant's objection, that his earnings from profits arising from commissions on sales in his regular employment had amounted for the two or three previous years to the sum of \$25,000 annually, and for 1891 the sum of \$31,000. It is contended that this was error, as no special damages were alleged. This is a question arising under the law of pleading in Illinois, where the decisions seem to be in some conflict, and we have not deemed it necessary to determine it in view of the fact that we find the next assignment of error to be considered conclusive against the judgment, and as, if there should be a new trial, it will be competent for the plaintiff to ask to be allowed to amend his declaration in this regard, if he should be advised that such a course were necessary or prudent.

Some special instructions were asked on the trial by de-

defendant's counsel on the question of contributory negligence on the part of the plaintiff, which the court refused to give, but in its general charge gave the following, which was the only instruction given on that subject, and to which proper exception was taken, to wit: "(2) The next question would be whether the plaintiff himself was guilty of contributory negligence, for, although it might be the duty of the railroad company to prevent passengers from alighting on the east side of their cars at this particular place, and under the dangers that surround such a discharge of their passengers, yet, if the plaintiff knew of the danger, and in the face of that knowledge got down on that side of the car, and met with this injury, the railroad company would not be liable. For that purpose you have a right to look into the plaintiff's knowledge on that subject. Had he traveled over that road,—over that suburban line, and gotten off at that place before? Is there any evidence that he had the dangers of that place in mind? Is there any evidence that he knew, when he was getting off on the east side of the car, he was getting off on the tracks instead of on the platform that was provided for that purpose? If you can find any evidence in the record to that point, it is your duty to look at it, and if you find that the plaintiff, at the time that he alighted, knew, or had good reason to know from his past experience,—if he had any past experience at that place,—of the dangers that menaced him there, then he is not entitled to recover; but if he did not have such experience, and did not have such knowledge, although other passengers may have had,—although the man whom he accompanied may have had,—he would be, nevertheless, free from the charge of contributory negligence, and would be entitled to recover, the other element of negligence on the part of the railroad company being made out."

Contributory
negligence—
Instructions.

This instruction is wrong in itself and wrong in not covering the entire ground which such an instruction should cover. By this instruction the whole question of contributory negligence was made to turn upon a matter of fact of which there had been no dispute in the testimony, to wit, whether or not the plaintiff had been there before, got off at the same place, and become acquainted with its dangers. The plaintiff testified he had never been there before, and there was no evidence to the contrary, and the jury were told that

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they should look into the evidence, and, if they found that the plaintiff, at the time that he alighted, knew or had good reason to know from his past experience,—if he had any past experience at that place,—of the dangers that menaced him there, then he would not be entitled to recover; but if he did not have such experience, and did not have such knowledge, although others may have had,—although the men whom he accompanied may have had,—he would be, nevertheless, free from the charge of contributory negligence, and would be entitled to recover, the other element of negligence on the part of the railroad company being made out. As there was no dispute about the plaintiff ever having been there before, or ever having had any past experience at that place of the dangers that menaced him there, this instruction, withdrawing as it did from the jury all consideration of contributory negligence founded upon other considerations, was equivalent to directing a finding in favor of the plaintiff upon the question of contributory negligence, and submitting the case to the jury upon the question of the defendant's negligence alone. The jury was nowhere told that if the want of ordinary care and prudence upon the plaintiff's part contributed materially to produce the injury, he could not recover.

Of course, the plaintiff's previous knowledge or want of knowledge of the place was a material circumstance to be considered by the jury in determining the question of contributory negligence, but it was not the only circumstance to be considered. Whether he had had any past experience of the dangers of the situation or not, he was bound to exercise his senses. He must use his eyes and ears, and exercise the care and prudence which a man of ordinary care and prudence would be expected to use in the same circumstances to avoid accident. If the question had been submitted to them, who can say that the jury might not have found that the plaintiff did not exercise ordinary care in making inquiry as to the proper place of alighting from the train, or that he was guilty of negligence in not keeping a more constant lookout for approaching trains while he was walking between the tracks upon the planking? None of these questions, or that of contributory negligence generally arising from any cause, were submitted to the jury.

Contributory
negligence—
Continued.

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On the question of the plaintiff's negligence, the following special instructions were asked for by defendant's counsel, and refused by the court, and exceptions duly taken:

"(4) Where a proper landing place is provided, and the passenger knows, or would, by the exercise of ordinary care, have ascertained, its locality, he should make his exit at the place so provided; and if, in attempt-^{Same.} ing to alight elsewhere, he unnecessarily and negligently exposes himself to danger, and is thereby injured, this injury is the result of his own act, and he cannot recover damages therefor from the railroad company. (5) If you believe from the evidence that the plaintiff knew, or would, by the exercise of ordinary care, have known, that the planking between tracks 2 and 3 was not of a reasonably safe width for him to walk or remain upon should another train pass by upon track 2, and you further find from the evidence that he voluntarily and unnecessarily remained on such planking, and by reason thereof was injured as complained of, then the plaintiff is not entitled to recover, and your verdict must be for the defendant."

We see no good objection to either of these requests, and, as nothing in the general charge covered the same ground, we think it was error not to give them. For these reasons *the judgment is reversed, and the cause remanded* to the circuit court for a new trial, or for such proceedings as may be proper.

FLOYTRUP (Catharine)

v.

BOSTON & MAINE R. CO.

(163 Mass. 152.)

Action for Injury to Passenger Alighting from Train—Evidence of Usage as to Trains Entering Station.—Evidence of the usage of a railroad company that one train should not enter a station while another train was engaged in delivering passengers there is competent upon the question whether the company's servants properly managed the train. (*Page 276.*)

Same—Admissibility of Evidence as to Announcement of Change of Cars.—In an action by a passenger who sustained injuries while alighting from a train at rest, by reason of the sudden starting of the train, evi-

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dence is admissible that when the train reached its destination, but before stopping, an announcement was made, "L., change for B.!" since the fact of the announcement, whether made by a train hand or any other person, was competent upon the questions whether the passenger's conduct was careful, other passengers having preceded her, and whether the company's servants used due care to prevent her from attempting to leave the train at a time when it had not stopped to deliver passengers. (Page 277.)

Same—Passenger's Knowledge of Usage.—The evidence was also admissible as affecting the passenger's exercise of due care, because of the company's contention that she knew the usage under which the train had stopped, i.e., not to deliver passengers, but to avoid danger to passengers leaving another train. (Page 278.)

Contributory Negligence of Passenger Alighting from Moving Train.—If a passenger in the exercise of due care supposes that a train has stopped to allow passengers to get off, and it does not start until she is in the act of descending the steps, the fact that it does start before she leaves it will not of itself prevent a recovery. (Page 278.)

Duty of Company to Warn Passengers Not to Leave Cars—Province of Jury.—It is a question for the jury whether the fact that the announcement, if unauthorized, did not impose on the company a duty to give a counter-warning that passengers should not leave the train. (Page 278.)

Negligence of Company in Allowing Passenger to Go on Car Platform.—Under such circumstances it might be negligence to allow a passenger to go upon the car platforms for the purpose of leaving the train. (Page 279.)

Admissibility of Brakeman's Testimony as to Hearing Announcement.—Testimony of a brakeman that he did not hear the announcement was competent on the question as to whether it was his duty to warn passengers not to leave the train. (Page 279.)

Same—Admissibility in Rebuttal of Testimony as to Announcement.—Testimony in rebuttal that such an announcement was made was admissible as tending to contradict the brakeman's testimony. (Page 279.)

EXCEPTIONS from superior court, Suffolk county. *Exceptions sustained.*

It appeared in evidence that the station and adjoining structures in Lynn consisted of a main edifice, 180 feet in length, with a roof covering the tracks, the tracks being two in number, the westerly one being used for trains going towards Boston, and being the one which was used by the train on which the plaintiff was a passenger. On both sides of the tracks long, covered, concrete platforms or walks extended northerly from the main building of the station; that on the westerly side extending 228 feet beyond the covered part of the station, and a narrower wooden platform extending still further to the north, about 150 feet. The other structures, on the westerly side of the track, connected with the station, were the men's water-closet, under the covering of the concrete platform, and other wooden build-

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ings north of the water-closet. The permanent roofs or coverings above the concrete platforms, according to the evidence adduced, protected passengers from rain and storms in getting on and off from trains, and were coextensive with the platforms upon both sides.

The plaintiff's testimony tended to show that she was travelling from Marblehead to Lynn, on the evening of the accident, sitting in the second seat from the rear door of the car; that the train came to a full stop in the Lynn station before she left her seat; that two gentlemen and one lady had preceded her, and had alighted from the train; that she had got as far as the lower step, and had one foot off, in the act of alighting, when the train suddenly, and without warning of any kind, started, throwing her upon the concrete platform in the station, between the men's water-closet and the main edifice.

The plaintiff also testified that since her marriage, about 30 years before, she had resided in Lynn, and her parents in Marblehead; that she had been accustomed to visit them in Marblehead during this time frequently, traveling by this railroad for that purpose.

The plaintiff offered further testimony to show that when they reached Lynn, and before the train stopped, "Lynn, change for Boston!" was called by some one; but, on defendant's objection that it did not appear to be a railroad man, the court excluded the testimony, subject to plaintiff's exception.

It appeared from the testimony of the engineer of the train that when the train from Marblehead approached the Lynn station he saw that a train from Boston was discharging its passengers in the station upon the other track; that in consequence he held back his train, and did not enter with it under the main covered portion of the station, until after the train discharging its passengers had started to move out of the station. He then pulled his train under the covered portion of the station. It also appeared that the part of the platform where the accident occurred was fully lighted.

Testimony on behalf of the defendant tended to show that the train came to a full stop at the concrete platform; that the train stopped from 30 seconds to a minute, **Facts continued.** and then started up further in the station; when the plaintiff attempted to alight from the train, the car upon which she was riding was at the northerly end of the con-

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crete walk or platform; that car had four steps, including the upper platform; that while she was upon the second step from the top the train was in motion, and continued in motion while she descended the remaining steps, and that she stepped from the train while it was in motion; that there was no sudden start of the train, and no difficulty in seeing the platform and its neighborhood by reason of the want of light.

The defendant offered to show by the testimony of the conductor that it was the custom or usage of the road that one train should not enter a station when another train was engaged in delivering passengers.

The plaintiff seasonably objected to the admission in evidence of such custom and usage, but the presiding judge admitted it, saving plaintiff's exception.

There was no evidence that the plaintiff had any knowledge of this rule or custom, other than that before the accident she had traveled in the defendant's cars.

The defendant also asked the conductor of this train: "Q. Did you announce the station Lynn? A. Not then; no, sir."

The defendant further asked the brakeman upon the train: "Q. Did you call out the name of Lynn as the station when the train came there? A. No, sir. Q. Did you hear any one call, 'Lynn, change for Boston'? A. No, sir."

The plaintiff, in rebuttal, again offered the testimony excluded by the presiding judge in chief relative to the calling of the station, for the same purpose as when first offered, and also to contradict the testimony of the conductor and the brakeman, but it was excluded by the court, subject to plaintiff's exception.

The jury returned a verdict for the defendant.

John E. Hanly and *John F. Libby*, for plaintiff.

Solomon Lincoln, for defendant.

BARKER, J.—The evidence of the usage of the road that one train should not enter a station while another train was engaged in delivering passengers there was competent upon the question whether defendant's servants managed the train in a proper manner; and, if the plaintiff knew of it, it bore also upon the question whether she used due care. There was evidence that she had frequently used the railroad between Lynn and Marble-

Evidence of
usage of com-
pany.

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head, and this was evidence from which the jury might have found that she knew of the usage. The evidence of the usage was therefore rightly admitted. *O'Neill v. Railroad Co.*, 155 Mass. 371.

The remaining question is whether the evidence offered by the plaintiff that when the train reached Lynn, and before it stopped, "Lynn, change for Boston!" was called by some one, was admissible. This evidence was excluded, because it did not appear that the call was made by any person employed by the defendant. This was while the plaintiff was putting in her case. In the putting in of the defendant's evidence, after the conductor had testified that he did not then announce the station Lynn, and the brakeman had testified that he did not call out the name of Lynn as the station when the train came to the place where it stopped to wait while the other train discharged its passengers, the brakeman was asked, "Did you hear any one call, 'Lynn, change for Boston?'" and answered, "No, sir." In rebuttal the plaintiff again offered the testimony excluded in chief, relative to the calling of the station.

Upon the undisputed evidence the train had arrived within the limits of the station at Lynn, although not at the portion of the station at which its passengers were expected to leave it, and had completely stopped when the plaintiff started from her seat to leave the car. The stop was not made to deliver passengers, but for the purpose of allowing another train to deliver its passengers in the same station.

The plaintiff's evidence tended to show that three passengers preceded her in leaving the car, and had alighted from the train, and that, while the train remained stationary, she had got as far as the lower step, and had one foot off the step, in the act of alighting, when the train started suddenly, and without warning, and threw her upon the platform.

Announcement
of change of
cars.

The defendant's evidence tended to show that the train stopped from 30 seconds to a minute, and that it was again in motion when—the car having four steps—the plaintiff was upon the second step from the top, and that the train continued in motion while she descended the remaining steps, and stepped from the train. We understand from the offer to show that "'Lynn, change for Boston!' was called by some one," that those words were called out in the train

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so as to be audible to the passengers, and in the manner in which stations are usually announced.

Evidence that such an announcement was so made would of itself, perhaps, be some evidence that it was made by a servant of the defendant, as no one else would have a right to make such an announcement. But, however that may be, we think that evidence that such an announcement was made when the train reached Lynn and before it stopped, whether the announcement was made by a railroad man or by any person, was competent, both upon the question whether the plaintiff's conduct was careful and upon the question whether the defendant's servants used due care to prevent her from attempting to leave the train at a time when it was not stopped to deliver passengers. A passenger hearing such an announcement cannot be presumed to know that it was not made by the authority of the carrier. and, if the plaintiff did not know that the announcement was unauthorized, she was justified in preparing to alight when the train stopped. *England v. Railroad Co.*, 153 Mass. 490.

And, as affecting the question whether she was in the exercise of due care, the evidence was the more important because of the defendant's contention that she knew the usage under which the train had stopped, not to deliver passengers, but for the purpose of avoiding danger to passengers leaving another train.

If, in the exercise of due care, she supposed that the train had stopped to enable passengers to leave it, and it did not start until she was in the act of descending the steps, the fact that the train had started before she left it did not of itself prevent her recovery, if she did not know that it had started. *Merritt v. Railroad Co.*, 162 Mass. 326. From all the evidence the jury might have found that the train started when she was upon the second step from the top, but that she did not perceive that it was in motion until she had got as far as the lower step, and had one foot off in the act of alighting.

So, too, if, as a train is about to stop at a station for such a purpose as that for which the defendant's train was stopped, an unauthorized announcement of the station is made, accompanied by a direction to "change" for another station, we think it a question for the jury whether the fact that such a call has been publicly made does not impose upon the carrier a duty to

**Passenger's
knowledge of
usage.**

**Contributory
negligence.**

**Duty of com-
pany to warn
passengers.**

give a counter warning that passengers are not yet to leave the train, and that it may be found to be negligence on the part of the carrier to suffer a passenger to go upon the platform, without warning, for the purpose of leaving the train, under such circumstances. Allowing passenger to go on platform.

Finally, we think that the testimony of the brakeman that he did not hear any one call, "Lynn, change for Boston!" was competent as bearing upon the question whether it was his duty to warn passengers who appeared to be about to leave the train that it had not stopped for the purpose of allowing them to alight; and that the testimony, offered in rebuttal, that such an announcement was made, had some tendency to contradict the testimony of the brakeman, and should have been admitted for that purpose also. Admissibility of brakeman's testimony.

Exceptions sustained.

ABSTRACTS OF RECENT DECISIONS

Injuries to Passengers at Stations [(1) p. 283].—*Duty of Company.*—It is the plain duty of a railroad company to provide suitable, safe and convenient means for the ingress and egress of its passengers to and from its trains. *Eichorn v. Missouri, K. & T. R. Co.* (Mo., 1895), 32 S. W. Rep. 993.

Same—Same—Instruction.—In an action for personal injuries sustained in alighting from defendant's train the court charged the jury "That it was the duty of the defendant to have a suitable stopping-place at the station in question, and that she alleges to be the duty of the railroad company, under the circumstances surrounding this case," etc. *Held*, that the charge was not erroneous because not in conformity with the actual case made, i. e., "in resting only on the actual negligence in running the cars too far." *Madden v. Port Royal & W. C. R. Co.*, 41 S. Car. 440.

Same—Duty and Liability of Company.—A carrier of passengers owes, to those approaching or leaving its trains, the duty of keeping its station platforms in reasonably safe condition for convenient use, and is liable to such persons, who are themselves duly careful, for damages sustained by reason of its negligence in not observing this duty. *Fullerton v. Fordyce*, 121 Mo. 1.

Same—Instances—Failure to Provide Accommodations to Board Train at Station.—Where a depot was destroyed by fire and the company made no effort within five months thereafter to rebuild it or to provide a safe temporary platform, but required its passengers to alight from and board its trains in an open field, and failed to provide a platform or step to enable passengers to board the cars, and a pas-

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senger was injured while making the attempt, no assistance being proffered by the servants of the company, it was held that the question of contributory negligence was for the jury. *Eichorn v. Missouri, K. & T. R. Co.*, (Mo., 1895) 32 S. W. Rep. 993.

Same—Same—*Failure to Assist Infirm Passenger to Leave Train.*—In *Daniels v. Western R. Co.* (Ga., 1895), 22 S. E. Rep. 956, it appeared that an infirm passenger was placed on a train, with the knowledge of the porter, who agreed to assist her off, that none of the other train officials knew of her infirmity, that she was carried to her destination, and furnished a reasonable time to get off at a safe place, that in attempting to get off without assistance, she lost her foot and sustained the injuries complained of, and it was held that a verdict for the company would not be disturbed.

Same—Same—*Death in Unknown Manner.*—No one saw plaintiff's intestate leave at a station, and thereafter he was found fatally injured beside the track near the station. *Held*, that a judgment for the company would not be disturbed, although it appeared that deceased was obviously ill during his journey, and it was urged that defendant should have looked after him, helped him out of the car, and seen that he reached a place of safety. *Brady v. Old Colony R. Co.*, 162 Mass. 408.

Same—Same—*Leaving Railway Premises by Unsafe Route.*—Where it appeared that plaintiff on arriving at his destination in the nighttime was temporarily detained by freight train standing between his train and the depot, and that on attempting to go around the freight train, he fell into a cattle-gap with the location of which he was unacquainted and was injured, it was held that in the absence of any apparent necessity for him to go by that route or of any invitation or inducement by the railroad company to do so, he was guilty of such contributory negligence as would preclude a recovery. *St. Louis, I., M. & S. R. Co. v. Cox*, 60 Ark. 106.

Same—Same—*Failure to Provide Foot-stool.*—In an action to recover for personal injuries alleged to have been sustained in alighting from a train, and in which the company was charged with negligence, in failing to provide a proper foot-stool to enable the plaintiff to alight safely, there was held to be no error of which the defendant company could complain, in charging the jury as follows. "Of course, if you think it was negligence in her not to have, under the circumstances, seen the absence of the stool, and that she was not hindered from seeing it by her skirts, as she says she was, but went recklessly along,—I will not say 'recklessly,' because that implies gross negligence, but went negligently along, and took her step without making any observation at all,—then she would be guilty of contributory negligence." *Madden v. Port Royal & W. C. R. Co.*, 41 S. Car. 440.

Same—Same—*Insufficient Platform Steps.*—In an action against a railroad company to recover for personal injuries alleged to have been caused by the negligence of the defendant in failing to supply suit-

able steps to enable the plaintiff to leave the car, an instruction is erroneous which informs the jury that if the company provided and used such platform steps to enable the passengers to alight as were ordinarily provided for similar cars on similar roads, then in that respect it satisfied the requirements of the law. *Dougherty v. Kansas City & I. R. T. Co.*, (Mo.) 30 S. W. Rep. 317.

The court said: "The issue was not what platform steps are ordinarily provided for similar cars on similar roads, but whether the platform steps of this particular road at the time when plaintiff was injured were in a safe condition. The defendant cannot excuse itself from the obligation to furnish its passengers with reasonably safe appliances for getting in or out of its cars by showing that the appliances it had adopted had been adopted and used by other railroads engaged in a similar work. No amount of elaboration would make the matter any plainer or the error in giving the instruction any less. *Hill v. Railroad Co.*, 55 Me. 438; *Cleveland v. Steamboat Co.*, 5 Hun. 523; *Humbird v. Railway Co.*, 110 Mo. 76."

Same—Same—Backing of Car upon Passenger Leaving Railroad Premises.—A railroad company is liable for the death of a passenger who on alighting from a train at his destination, and while passing behind it on a public crossing to reach his home is knocked down and run over by the backing of the train without warning and without having stopped a reasonable length of time. *Dallas & O. C. R. Co. v. Reeman*, (Tex. Civ. App.) 32 S. W. 45.

Same—Same—Stepping off Insufficiently Lighted Platform.—It appeared that a station platform, about 190 feet long by 12½ feet wide, was lighted with but one lamp; that a passenger, thinking a train was coming, started toward what he supposed to be the stopping-place of the baggage-car for the purpose of putting a package therein, and that in the dark he stepped off the platform and was injured by the train: *Held*, that as the plaintiff acted with knowledge of the insufficiency of the light, his own negligence contributed to the injury and precluded a recovery. *Bradley v. Grand Trunk R. Co.*, (Mich.) 65 N. W. Rep. 102.

Same—Same—Tripping over Employé.—A railroad company is not liable to a passenger who, while walking rapidly on a station platform, looking straight ahead, trips over the foot of a baggage master who on receiving articles from a car stepped back, whereby the injuries complained of were sustained, when it appears that the platform afforded an unobstructed passage for 8 or 10 feet behind the baggage master. *Connor v. Concord & M. R.*, (N. H.) 30 Atl. Rep. 1121.

Same—Same—Stoppage of Train as Invitation to Alight.—Where the evidence tends to show that the injury complained of was sustained at a regular station at which passengers were wont to get on and off every day, and the plaintiff had always been informed by the conductor that he always stopped there, she was authorized to consider the stopping of the train at the station as an invitation to get

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off, although no announcement was made of the station. *Raub v. Los Angeles*, 103 Cal. 473.

Same—Same—Failure to Repair Dangerous Platform.—It is gross negligence on the part of receivers of a railroad company to allow a hole, eight inches wide and six feet long, to remain in the floor of that part of the platform commonly used by passengers, for a period of four days after knowledge thereof by their agents. *Fullerton v. Fordyce*, 121 Mo. 1.

Same—Right of Passenger to Assume that Platform can be Crossed Safely.—A passenger, on leaving a train, has the right to assume, in the absence of information to the contrary, that he can safely pass across the depot platform to take a conveyance to his destination. *Fullerton v. Fordyce*, 121 Mo. 1.

Same—Assumption of Danger—Failure to Leave Premises by Safest Way.—A passenger who on alighting from a train at night attempts to leave the railroad premises by the side on which he got off and is thereby injured, if there was on the other side a safe, commodious and well-lighted platform, by which he could have left the cars and depot grounds with reasonable safety, acts at his own peril and is precluded from recovery. *Louisville & N. R. Co. v. Rickets*, (Ky.) 27 S. W. Rep. 860.

Same—Proof as to Sufficiency of Light at Depot Platform.—Where in an action for injuries sustained by falling between the steps of defendant's car and the depot platform, the evidence showed that the platform was lighted, that there was an electric light upon it from 50 to 100 feet from where plaintiff fell, and that no complaint or suggestion of insufficiency of light had been made prior to the injury, the mere fact that plaintiff did not notice the light, will not sustain her contention of insufficient lighting. *Rothschild v. Central R. Co. of N. J.*, 163 Pa. St. 49.

Same—Proof of Danger—Evidence of Fellow-passenger.—Where in an action for death alleged to have been caused by insufficient station facilities at the intersection of two railroad lines, one of the issues litigated was whether the deceased voluntarily incurred the danger from which death resulted, while under the reasonable apprehension of a real or apparent danger, it was held that evidence by a fellow-passenger of the deceased to the effect that he arrived on the same train with the intestate, and alighted from a car at about the same time she did, and attempted to pass over from a narrow platform to the station platform; that just as he was about to step onto the station platform he became conscious that an engine was near him; that he was dragged from the track onto the platform; that the engine just brushed him as it passed; that this was the engine on defendant's mixed train, being the same train by which the intestate was killed, was admissible for the purpose of aiding in placing before the jury the situation as it presented itself to the deceased, thus enabling them to determine whether her conduct was

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negligent in the circumstances. *Ranney v. St. Johnsbury & L. C. R. Co.*, (Vt.) 32 Atl. Rep. 810.

Same—Sufficiency of Proof as to Distance between Depot Platform and Car.—The mere guess of a single witness as to the distance between car steps and a station platform, is not sufficient in an action to recover for personal injuries sustained by falling into the space, to prove the distance, where the exact distance or space could readily have been ascertained since the injury. *Rothschild v. Central R. Co. of N. J.*, 163 Pa. St. 49.

Same—Evidence as to Custom of other Roads in Discharging Passengers.—Proposed evidence as to the custom of discharging passengers from trains at stations where railroad lines intersect, other than the station at which the injury in question was sustained, which does not contain all the elements needed to show a substantial similarity of management under substantially similar circumstances, is properly excluded. *Ranney v. St. Johnsbury & L. C. R. Co.*, (Vt.) 32 Atl. Rep. 810.

NOTES

(1) P. 279]—**Duty of Railway Company to Furnish Proper Stational Facilities.**—It is the duty of a railroad company to afford to the passenger whom it undertakes to carry in its cars, a reasonable and safe opportunity to pass from the room or building in which it receives passengers for transportation to the cars, when the proper time arrives for them to embark for transportation. *Warren v. Fitchburg R. Co.*, 90 Mass. 227.

Hence it is actionable negligence for a railway company to permit a train to pass on a track, between a depot and another track on which a passenger train is standing while discharging and receiving passengers, just as passengers are passing from the depot to take such standing train, and across which track they were obliged to walk to reach their train, no provision having been made by the company to avert injury to the embarking passengers. *Klein v. Jewett*, 26 N. J. Eq. 474.

The rule that any person who goes upon a railroad track incautiously, or without using all reasonable precaution to escape injury, assumes the hazard, and if injury ensues is without remedy, is to be applied in determining the liability of a railroad corporation where the injury is sustained by a person crossing such tracks on a public highway; but it has no application to a case where, by the arrangement of the corporation, it is made necessary for passengers to cross the track in passing to and from the depot to its cars. *Id.*

Where a railroad train runs beyond the platform for the landing of passengers at a station, and stops over a culvert, and the proper servants of the railroad company announce the name of the station as a notification to the passengers for that station that the train was

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there, and whereupon a passenger for that station, who had paid the fare demanded, relying on the good faith of the company, alights upon and into said culvert, without his fault or negligence, supposing that he was alighting upon the usual platform, it being at night and so dark that he could not see that the train had not stopped at the platform, the company is liable for all injuries received under the circumstances. *Columbus & I. C. R. Co. v. Farrell*, 31 Ind. 408.

HUGHES (Lee)

v.

CHICAGO & ALTON R. CO.

(Supreme Court of Missouri, March 12, 1895.)

Action for Injury to Passengers by Throwing Mail-sack from Train—Cure of Instruction Ignoring Question of Contributory Negligence.—In an action by a passenger, who while waiting at a station was struck by a mail-sack thrown from a passing train, instructions which ignore the question of the contributory negligence of the passenger, though incomplete and erroneous if standing alone, will not constitute ground for reversal, if supplemented with those given for defendant, the respective theories of each party were harmoniously and consistently given to the jury. (*Page 286.*)

Necessity of Invocation by Plaintiff of Doctrine of Contributory Negligence in Instruction.—Contributory negligence is an affirmative defense which must be set up by defendant, if he wish to avail himself of it, and plaintiff is not required to invoke it in an instruction on his own behalf. (*Page 287.*)

Amendment of Instructions.—Defendant cannot complain of amendments to instructions asked by defendant, which widen the scope of such instructions, where the legal propositions involved in the amendment are sound, and are involved in the consideration and determination of the case. (*Page 287.*)

Injury by Mail sack Thrown from Passing Train—Relief from Charge of Negligence, by Proof of Prior Throwing of Sacks.—The fact that for eight months prior to the injury complained of it was the ordinary custom of the company to throw mail-sacks from its trains at the place in question, and that no injury had resulted during that time, will not warrant a finding that the company was not guilty of negligence in the instance complained of. (*Page 288.*)

APPEAL from Saline county circuit court. *Affirmed.*

Boyd & Murrell, for appellant.

Alf. F. Rector and Saml. Davis, for respondent.

Hughes v. Chicago & A. R. Co. Injury to Passengers

ROBINSON, J.—This is a suit for personal injuries to plaintiff, alleged to have been received by him while at defendant's depot platform in the city of Independence, in this state.

Defendant is a corporation operating a line of railroad from the city of Louisiana, in Pike county, Mo., through the city of Independence, to Kansas City. The petition states, in substance, that on the 19th day of December, 1891, plaintiff, intending to become a passenger on one of defendant's trains, and having purchased a ticket for that purpose at defendant's depot, was awaiting the arrival of the train on which he desired to take passage, and that, while walking on the platform in front of said depot, one of defendant's trains passed said depot running at a very rapid rate of speed, carrying heavy mail sacks made of leather and iron, one of which was by the servants of defendant negligently and carelessly thrown from the baggage car of said train, and struck plaintiff, thereby breaking his leg and otherwise injuring him; and, further, that defendant, knowing of the danger attending the throwing off of said sacks to persons on its platform, failed to notify plaintiff of said danger, and negligently failed to place on or near said platform any signal to warn persons of the danger of being on the platform when its trains were passing, or the fact that mail sacks would be thrown off at that time and place; the plaintiff was ignorant of the fact that mail sacks were to be thrown from said train, and ignorant of the danger incurred by being on said platform at the time and place when he was struck, and plaintiff was thereby thrown off his guard, and prevented from taking the necessary steps to avoid injury; and that by reason of defendant's negligence plaintiff was greatly injured, etc. Case stated.

Defendant filed a general denial, coupled with a plea of contributory negligence on part of plaintiff, to which the usual replication denying new matter contained in the answer was filed.

The case was tried by a jury on instruction, and resulted in a verdict for plaintiff for \$5000.

Facts were testified to tending to prove every phase of the case as presented by the instructions given by the court, and the only error assigned by appellant, asking a reversal of the judgment, is that the court gave improper instructions for

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plaintiff, and improperly modified instructions numbered 1, 2, and 3 asked by defendant, and in refusing instruction number 4 asked by defendant.

As we understand the errors complained of, it will be unnecessary to give the facts of this case, but content ourselves by saying that testimony was offered tending to prove the allegations of both the petition and answer filed thereto.

The error alleged against the giving of instructions for plaintiff was that they ignored all evidence tending to prove negligence on part of plaintiff, and directed a finding for plaintiff on the facts alone as submitted by plaintiff, and that they singled out parts of the evidence not of themselves decisive of the case, and directed a finding upon them alone for plaintiff.

While instruction No. 1, given for plaintiff, which declares, in effect, "that if a mail-sack was thrown from a rapidly moving train so as to strike plaintiff, who was at defendant's depot as a passenger awaiting to take passage on one of its trains, and that when said sack was thrown or dropped from said train plaintiff was seen, or by the exercise of proper care and caution could have been seen, by the person who threw or dropped said sack, in time to have prevented the injury, then the dropping or throwing of said sack, under such circumstances, constituted negligence, and the jury must find for plaintiff," wholly ignored the question of plaintiff's contributory negligence (if any was shown by the testimony), and asserted a right of recovery under the circumstances named in it, without containing the requirement of any care or caution on part of plaintiff, and without reference, direct or in any wise, to the issues raised by the defendant, or on the issues as presented by defendant's instruction; yet in view of the instruction given in the case for defendant, which set out so clearly and fully the rights of defendant, the duty, obligation, assumption, and care on part of plaintiff, we cannot say that reversible error was committed by the trial court.

This court has repeatedly held, since the decision in the case of *Owens v. Railroad Co.*, decided in 95 Mo. 169, 33 Am. & Eng. R. Cas. 524, overruling the contrary doctrine announced in the case of *Sullivan v. Railway Co.*, decided in 88 Mo. 169, as well as in numerous cases earlier than the *Sullivan* case, that where a series of instructions, taken to-

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gether, contain a complete exposition of the law, and cover every phase of the case, the verdicts obtained thereon will be sustained, even though the instructions, when taken separately, may be incomplete, and open to objection and criticism; that if, taken together, the full law of the case can be ascertained, they are complete, and there is no necessity for "qualifying each instruction by an express reference to the others."

The same complaint was made to the giving of the other three instructions for plaintiff as were made to the first.

Under our view of the law, all are cured by the instruction given for defendant, though incomplete and erroneous as each would have been if considered alone and of itself; but, with the instructions of defendant supplementing those given for plaintiff, the respective theories of each party to the litigation were harmoniously and consistently given to the jury, and we think no injury was done.

The soundness of the legal propositions contained in either or all of the instructions for plaintiff, as independent declarations of law, is not disputed by appellant; but it denies the right of the court to direct a recovery, under the circumstances named in one or all of the instructions asked for plaintiff, without the requirement of care or caution on the part of plaintiff submitted.

Invocation of
doctrine of
contributory
negligence by
plaintiff.

Contributory negligence is a matter of affirmative defense, that must be set up by a defendant in all cases, if he wishes to avail himself of it, and the plaintiff will not be called upon or required to invoke it in his instruction in behalf of defendant.

Appellant's complaint that the court refused to give instructions Nos. 1, 2, and 3 asked by it, and committed error in amending same, appears rather inconsistent and irreconcilable with its first assignment of error, when it is stated that the amendment made by the court to defendant's instruction was simply by adding to the end of each these qualifying words: "Unless the jury shall believe from the evidence that the person dropping the mail-sack saw the plaintiff, or by the exercise of ordinary care could have seen him, in time to have avoided the injury." In other words, the court erred when it submitted an instruction to the jury in behalf of plaintiff that failed to contain a

Amendment to
instructions.

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full and complete exposition of the law of the case in each instruction, yet sinned most grievously when it undertook to widen the scope of instructions asked by defendant by a simple amendment, though appellant itself does not controvert the soundness of the legal propositions contained therein, or deny that they are involved in the consideration and determination of the case.

Appellant next complains that the trial court erred in refusing to give instruction No. 4 asked by it, in words and figures following: "If the jury believe from the evidence that for a period of eight months before the 19th of December, 1891, it had been the ordinary custom of defendant to throw mail-sacks from its train upon the platform at Independence, while such train was in rapid motion, and that no personal injury had occurred to any one from such throwing off of mail-sacks prior to that date, and that on the morning of the 19th of December, 1891, mail-sacks were thrown from such train in the same manner and with the same care they had usually been thrown prior to that date, then the jury will not be warranted in finding that mail-sacks thrown from the train on December 19, 1891, aforesaid, were negligently thrown off."

Prior throwing
of mail-sacks.

The giving of the instruction would amount to the assertion that a custom, however dangerous to human life it might be, had it been pursued for a period of eight months by defendant without injury to any one, up to the date of the injury complained of, might be interposed as a defense, by the party exercising it, from the consequence of its dangerous continuance.

The duty enjoined upon defendant to exercise care, caution, and vigilance is not dependent upon the fact that upon some former occasion a like injury had happened at this exact place, and under similar circumstances and conditions. The act itself was dangerous. The consequences of it could have been reasonably foreseen, and injuries from it reasonably been avoided, only by the exercise of the greatest care on part of defendant to warn all persons on its platform to be on the lookout. There was a natural and probable connection between throwing the mail-sack from a fast-moving train upon a platform where passengers might be expected to be, and where they were invited and solicited to be by defendant itself, and the injury which actually happened to

Scheiber v. C., St. P., M. & O. R. Co. **Injuries—Contributory Negligence**

this plaintiff. Neither the previous vigilance of defendant for the past eight months (if it was its vigilance that saved the plaintiff and others from a similar accident), nor the extraordinary vigilance and precaution of those who on former occasions had been present at its depot platform when its agents were discharging mail-sacks from its rapidly-moving cars, nor their skill as dodgers of flying mail-sacks, nor that indefinable influence or agency that seems ever to attend the acts and doings of some parties and institutions (despite themselves), called "good luck," had they all conspired and combined to save defendant from the natural consequences of its dangerous undertaking, and prevented an injury to any one up to the fatal 19th of December, could be called to the aid of defendant for its carelessness on that occasion. The danger of the undertaking was a continuing demand upon defendant to the exercise of the extremest care and precaution to avoid an accident, and no aid can be invoked from any custom or usage, or former good behavior of others, or good luck of defendant, to shield it from the negligent act that resulted in plaintiff's injury. I say "negligent act," because the jury, who heard and determined the probative force of the testimony that was developed before them, under proper instructions, when the issue of care and caution was duly submitted, so characterized the act by their verdict.

We think the trial court committed no error, and its *judgment will be affirmed*.

All concur.

SCHEIBER (Frederick W.)

v.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA R. CO.

(*Supreme Court of Minnesota, June 28, 1895.*)

Contributory Negligence [(1) p. 293]—**Injury to Passenger on Steps of Car in Anticipation of Stoppage.**—The plaintiff was a passenger upon the defendant's railway train, operated by steam; and, as it was approaching the station at a dangerous rate of speed, he went, in anticipation of its stopping, and for the purpose of being ready to get off when it should stop, upon the platform of the car, and stood upon the steps thereof, and was thrown therefrom by a sudden jerk of the train, which, instead

Injuries — Contributory Negligence**Scheiber v. C., St. P., M. & O. R. Co.**

of stopping, increased its speed when opposite to the station. There was no evidence of any necessity for him to assume such position, or invitation, express or implied, by the defendant's agents in charge of the train for him to do so. *Held*, that he was guilty of contributory negligence, as a matter of law. (*Page 290 et seq.*)

APPEAL from Ramsey county district court. *Affirmed.*

J. L. Macdonald, for appellant.

Thomas Wilson and S. L. Perrin, for respondent.

START, C. J.—This is a personal injury case, wherein the plaintiff seeks to recover for injuries sustained by him by reason of the alleged negligence of defendant in the management of its railway train upon which he was a passenger.

Case stated.

The trial court, at the close of the evidence, instructed the jury to return a verdict for the defendant, and it was so returned.

To this instruction the plaintiff excepted, and from an order denying his motion for a new trial he prosecutes this appeal.

Under the evidence, the question of the defendant's negligence in the premises was one of fact for the jury, and the instruction of the trial court can be justified only upon the

Province of court and jury.

ground that, under the undisputed evidence, the question of the plaintiff's contributory negligence was one of law for the court. Where the facts as to the negligence of a party are undisputed or conclusively proved, and there is no reasonable basis for drawing different conclusions from them, the question is one of law for the court. It is not sufficient that the facts are admitted, for the decisive test is whether or not fair-minded men could honestly and reasonably differ as to the inferences to be drawn from the admitted facts. *Abbott v. Railway Co.*, 30 Minn. 482.

This rule must be applied in practice with caution, lest the courts usurp the functions of the jury, and unwittingly deprive a party of his constitutional right to a trial by jury; and, if there is a fair doubt as to the inferences to be drawn from an admitted state of facts, the question must be submitted to the jury; but, in the absence of such fair doubt, it is equally the duty of the court to decide the question as one of law, and instruct the jury accordingly.

We have examined the evidence in this case in the light of this rule and caution, and have reached the conclusion that the only reasonable inference to be drawn from the un-

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disputed facts is that the plaintiff was himself guilty of contributory negligence, and that the jury were properly directed to return a verdict for the defendant.

The plaintiff's own statement as to how he was injured is substantially as follows: On June 7, 1893, he was a passenger on the defendant's railway train, which was operated by steam, from the Union Depot in St. Paul to its East Seventh street station in such city. He had been accustomed to ride on this train daily for 5 days in each week for 18 months next before he was injured. During this time, the train always made a very brief stop at the last-named station, which was near his home, and where he was accustomed to alight from the train. On the day named, as the train approached the station, he noticed that it was going very fast, faster than it generally did; and, when it came within perhaps two car lengths of the station, steam was shut off, and he was led to believe that the train was going to stop; so he got up, and went upon the platform of the car, and got upon the steps, when the train was nearly opposite the depot, so as to be ready to step off from the train when it stopped, but, instead of stopping, steam was suddenly put on, the train gave a jerk, and he was thrown from the train, and seriously injured. He further stated that the train was running faster than usual, about 30 miles an hour, until it slacked up. When he went out on the platform, it was running, according to his judgment, about 20 miles an hour, and he went down the steps of the car, and stood on the lower step, with his back to the station, with his hands hold of the guard rails. While so standing, the speed of the train was suddenly increased, and he was thrown off.

From other evidence in the case it appears that the train was running from 15 to 25 miles per hour, and that the number of passengers getting off from this train daily at this station was from three to five, and that the train always stopped to let them off; but the stop was very brief, just long enough to let them off,—ordinarily, from 30 seconds to a minute and a half.

There is no evidence in the case that the train is accustomed to start up before the passengers were off, or that it was customary for them to be on the platform of the car ready to get off, when the train stopped, or that there was any necessity for them to do so, or that the defendant ever

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directly or indirectly invited or directed them to do so; on the contrary, the defendant kept posted up at each end of the car the plaintiff was riding in the words, "Passengers must keep off the platform until the train stops."

It is not negligence *per se* for a passenger in a railway car, as it approaches a station, to leave his seat, and go to the door of the car, in order to alight when it stops; neither is it such negligence, under all circumstances, for him to ride on the platform, or go upon it before the car stops for the purpose of getting off when it does stop, for there may be cases where, from necessity or the express or implied invitation of those in charge of the train, a prudent man would do so, but, in the absence of such facts, it is such negligence.

It is true, as claimed by his counsel, the plaintiff had a right to rely upon the uniform custom of the defendant to stop the train at this station, and to assume that it would do so on the occasion in question, but he was also bound to assume that, if the train did stop, the law would be complied with, and the train stop long enough to afford him and other passengers a reasonable opportunity to alight in safety after it came to a full stop.

Taking the most favorable view of the plaintiff's own evidence for him, it is apparent that there was no necessity for him to expose himself to danger, as he did. There was neither necessity nor invitation, direct or implied, by the defendant, to justify him in standing upon the steps of a car which was approaching the station at a dangerous rate of speed. His action was in violation of the express posted prohibition of the defendant, which must have been known to him. The only inference that can be drawn from the admitted facts is that he was guilty of negligence contributing to his injury.

That this is so does not admit of a fair doubt, and the direction of the trial court to the jury to return a verdict for the defendant was correct.

Order affirmed.

BUCK, J., took no part.

McDonald v. Boston & M. R. Co.

Injuries—Contrib-
utory Negligence

ABSTRACTS OF RECENT DECISIONS

(1) p. 289] **Contributory Negligence** [(1) p. 299]—**Custom for Train to Slow Down to Permit Passenger to Disembark—Passenger Thrown from Train.**—A passenger on a railroad train, with a ticket for a station at which it is customary for the train not to stop, but to slow its movement, so as to allow passengers to alight, will be entitled to damages if, called to the platform by the announcement of the station, he is thrown from the steps of the car and injured; his fall being caused by the sudden increase of the speed of the train, when it should have been slowed or stopped. Whart. Neg. §§ 371, 375, 377.

Nor will it make any difference in the liability of the railroad company that the passenger is thus thrown from the car on the side opposite to his station; the train having passed the station without affording him an opportunity to alight, and he having crossed to the other side under the reasonable expectation that the train would be slowed at his destination a few feet beyond the station. *Brashear v. Houston Cent., A. & N. R. Co.*, 47 La. Ann. 735.

MCDONALD (Stephen)

v.

BOSTON & MAINE R. CO.

(*Supreme Judicial Court of Maine, April 20, 1895.*)

Duty of Passenger on Train Moving Past His Destination—Duty of Company.—It is the obvious duty of a railroad company to stop its train at a station a sufficient length of time to give all passengers desiring to stop there a reasonable opportunity to alight upon the platform with safety. But the failure of the company to stop its train at a station as it ought to do, or to stop it for a sufficiently long time, does not justify a passenger in leaving a moving train. His proper course is to be carried on until the train stops, and, if he sustains pecuniary or other loss from being carried beyond his station, his remedy lies in an action for damages. (*Page 297.*)

Leaving Moving Train as Prima Facie Evidence of Negligence [(1) p. 299]. —It is an established rule of law that, in the absence of anything to create excitement or cause alarm, the attempt to leave a car while the train is in motion, by jumping from the steps of the car to the platform of the station, is *prima-facie* evidence of negligence on the part of the passenger. (*Page 297.*)

Same—Carrying Past Station.—The mere circumstance that the plaintiff is being carried past one station to the next station, only a few rods further from his home, is insufficient to exonerate him from negligence in attempting to alight from a moving train. (*Page 298.*)

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Same—Advice of Conductor as to Method of Leaving Train.—Under such circumstances, in suggesting that the passenger should "jump with the train," or "not jump sideways," *held*, that it was plainly the intention of the conductor not to advise the passenger to leave the train, but to remind him of the safest method of doing so, if he was resolved upon making the attempt. (*Page 298.*)

EXCEPTIONS from York county supreme judicial court.
Motion to set aside verdict. *Sustained.*

This was an action on the case in which the plaintiff recovered a verdict for injuries received by him in alighting from the defendant's passenger train.

The acts of negligence by the defendant, as alleged by the plaintiff, were in that while he was alighting from said train the defendant carelessly, negligently, and violently started, and caused to be started, said train, throwing the plaintiff from said train suddenly and violently to the platform, and not stopping the train sufficiently long for him to get out.

Plea was the general issue. After all the evidence in the case had been taken out before the jury, counsel for defendant moved the court to direct a verdict in its favor, which the court refused to do, and to this refusal the defendant excepted. After the verdict for the plaintiff, the defendant also filed a general motion for a new trial.

The facts, as claimed by plaintiff, were as follows:

About 7 P.M., July 25, 1893, he purchased a ticket at defendant's station at Saco, and took the train for Old Orchard.

Before reaching that station the train stopped at the station of Camp Ground, which was previously announced. No actual notice had been given by plaintiff to any of the trainmen that he intended or desired to stop there. He started, however, to leave the train, he says, as soon as it stopped, going towards the door in the forward end of the car, and when he reached the door he discovered that the train was in motion. He passed out upon the car platform, when, he says, the conductor told him to "jump with the train." He jumped, and was injured by falling upon the station platform, and dislocating his left hip joint. He was about 50 years of age, and had a basket containing groceries. Rain had fallen, and the platform of the station was damp.

Defendant claimed that the facts were as follows:

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Plaintiff's ticket being for Old Orchard, it had no actual and no seasonable, constructive notice that he wished to terminate his journey elsewhere; that the train, however, did stop at Camp Ground, that station having been previously announced through the train, long enough to permit all to get out, of whose intention so to do it had, or, exercising reasonable diligence and care, could obtain, seasonable notice, and also long enough for those desiring to get in; that in fact two other persons did get out, and one got in, during the stop, which was from three quarters of a minute to a minute; that before starting the train the brakeman looked through the door and the aisle of the rear car, where plaintiff was, and also into the car ahead of it, and saw no one, either in the aisles, or making any preparations to get out, then gave the signal to the conductor, who was upon the station platform, and who, after receiving a similar signal from the train baggage master, signaled the engineer to start, which he did, without jerk, and in the usual manner.

Facts claimed
by defendant.

The conductor then stepped upon the car platform, and was about to enter the rear door of the car immediately ahead of the rear car, when, partially turning, he saw plaintiff upon the platform, with basket in both hands, about to jump. He shouted to him, "Don't jump sideways." Plaintiff did jump, and was injured.

B. F. Hamilton, B. F. Cleaves, and C. S. Hamilton, for plaintiff.

WHITEHOUSE, J.—The plaintiff obtained a verdict for \$1500 against the defendant for an injury sustained by jumping from a moving train at Camp Ground station, between Saco and Old Orchard. The negligence imputed to the defendant was its failure to stop the train a sufficient length of time to enable the plaintiff, in the exercise of reasonable diligence, to alight before the train proceeded. The plaintiff also claimed that in jumping from the train he acted under the direction of the conductor.

Additional
statement.

The case comes to this court on a motion to set aside the verdict, as against evidence, and exceptions to the refusal of the presiding justice to direct a verdict for the defendant.

It is the opinion of the court that the verdict cannot be allowed to stand, on the evidence reported. The plaintiff

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fails to establish either the defendant's negligence, or his own due care.

On the evening of July 25, 1893, the plaintiff purchased a ticket at Saco for "Old Orchard and return," and took the local train, leaving the former station about 7 o'clock, intending to stop at the intervening station, called "Camp Ground," for which no tickets were specially provided. The train stopped there long enough for two passengers to alight, and one woman to get aboard the train. The plaintiff was in the rear passenger car. He started to leave the train at some time after it stopped, and when he reached the forward end of his car he discovered that the train was in motion. He passed out upon the car platform, when the conductor, according to the plaintiff's testimony, said to him, "Jump with the train," or, according to the conductor's testimony, "Don't jump sideways." He jumped, and fell upon the platform, dislocating his hip joint. Rain was falling at the time, and the platform of the station was wet. Before the conductor received from the brakeman the signal to start, none of the trainmen had any notice of the plaintiff's desire or purpose to leave the train, other than that indicated by his ticket for Old Orchard. But Camp Ground was duly announced through the train before its arrival there, and before giving the signal to start the brakeman looked through the doors of the two passenger cars of the train, and saw no one in the aisle, and no one preparing to leave his seat, in either of them. The train stopped from three fourths of a minute to a minute. The plaintiff says he started to leave the train as soon as it stopped, but the testimony of the conductor and brakeman, to the effect that he did not leave his seat until the signal to start was given, is corroborated by the testimony of Mrs. Bryant, a disinterested passenger sitting near the plaintiff, in the rear car, who says the car was in motion when the plaintiff walked past her towards the door.

The plaintiff was about 50 years of age, and a weaver by occupation. At this time he was returning to his home, situated about halfway between Camp Ground station and Old Orchard,—a little nearer the former,—and was carrying a peck basket containing some groceries. He had been "riding on this train more or less during the summer," and must have known that only a short stop was required at that

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time for the business at Camp Ground station. The baggage master and station agent say the stop on this occasion was of "about the usual" length.

It is the obvious duty of a railroad company to stop its train at a station a sufficient length of time to give all passengers desiring to stop there a reasonable opportunity to alight upon the platform with safety, and in this case there seems to be a preponderance of all the evidence in favor of the defendant's contention that its train did so stop at Camp Ground station on the evening in question. There was a conflict of testimony, however, and it may be questionable if the court would be required to reverse a finding of the jury against the defendant upon this point. But the conclusion is still unavoidable that the accident was not caused by the fault of the company, but by the plaintiff's own want of ordinary thoughtfulness and prudence.

Duty of passenger on moving train.

It is now an established rule of law, recognized by the decisions of our own court, and supported by the great weight of authority elsewhere, that, in the absence of anything to create excitement or cause alarm, the attempt to leave a car while the train is in motion, by jumping from the steps of the car to the platform of the station, is *prima facie* evidence of negligence on the part of the passenger. Gavett v. Railroad Co., 16 Gray 501; Lucas v. Railroad Co., 6 Gray 64. "There cannot be a doubt," says Peters, C. J., in Shannon v. Railroad Co., 78 Me. 59, 23 Am. & Eng. R. Cas. 511, "that, generally speaking, a passenger is not justified in getting upon or off of a moving train, unless at his own risk. If all you know of it is that a passenger jumps from a train in motion and is injured, you would charge him with carelessness for the act. The act is *prima facie* negligence." In 2 Wood R. R. (Minor's Ed.) § 305 the author says: "It appears to us that, in view of the danger which necessarily attends such an act, it should be held, as a matter of law, that it is negligence to attempt to board or to alight from a train while it is in motion; and the question should not be left to the jury, unless there are exceptional circumstances tending to excuse or justify the act. And the great weight of authority favors this view. The failure of the company to stop its train at a station as it ought to do, or

Leaving moving train as prima facie evidence of negligence.

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to stop it for a sufficiently long time, does not justify a passenger in leaving a moving train. His proper course is to be carried on until the train stops, and, if he sustains pecuniary or other loss from being carried beyond his station, his remedy lies in an action for damages." See, also, 2 Rorer R. R. p. 1116; Deer. Neg. § 95.

The burden was on the plaintiff to prove that he jumped from the train under exceptional circumstances which would justify or excuse such an act of imprudence. The mere circumstance that he was being carried past Camp Ground, to the next station, at Old Orchard, which was only a few rods further from his home than Camp Ground station, is plainly insufficient to exonerate him from blame; and, if this had been the only excuse offered, it would have been the duty of the presiding judge to direct a verdict for the defendant.

But the plaintiff further says that, in jumping as he did, he acted under the direction or advice of the conductor. It is not in controversy that the conductor made some remark to the plaintiff respecting his manner of jumping; either saying, "Jump with the train," or "Don't jump sideways." It is immaterial which form of expression was used. Interpreted in the light of the situation and circumstances, they may reasonably be regarded as having substantially the same import. The conductor saw a man of mature years appear upon the platform of the car, evidently preparing to alight, and naturally assumed that the passenger understood the situation, but had determined to take the risk of stepping off of the train. It was plainly the intention of the conductor not to advise the passenger to leave the train, but to remind him of the safest method of doing so, if he was resolved upon making the attempt. It is wholly improbable that the plaintiff understood the remark in any other way. His decision to alight at Camp Ground station had already been made. It was not influenced by this remark.

The accident was a very unfortunate one for the plaintiff, and his injury and suffering are a source of sincere regret; but the evidence wholly fails to establish any liability on the part of the defendant company, and it is the plain duty of the court to set aside the verdict.

Motion sustained. Verdict set aside.

ABSTRACTS OF RECENT DECISIONS

Contributory Negligence, what Constitutes [(1) p.301]—*Standing on Steps of Crowded Street-car.*—A person standing on the steps of a moving street-car, being unable to secure a seat or standing room within, is presumed to be there with the consent of the servants in charge of the train. *Pray v. Omaha St. R. Co.*, 44 Neb. 167.

Same—Same.—It is not such negligence for a passenger to stand on the front steps of a crowded street-car, while in motion, as will *per se* prevent a recovery for injuries received in consequence of the negligence of persons in charge thereof. *Pray v. Omaha St. R. Co.*, 1895, 44 Neb. 167.

Same.—A railroad company is not liable for injuries sustained by a passenger who while standing on a car seat to reach bundles in an overhead receptacle is thrown by the sudden starting of the train. *East Tennessee, V. & G. R. Co. v. Green*, (Ga.) 22 S. E. Rep. 658.

Same—Riding on Foot-board of Trolley-car.—The danger of being hit by a trolley pole is not such a peril as a passenger whom the railway company has undertaken to carry on the foot-board of its car is bound to anticipate and be on the lookout for, unless it appears that the passenger had knowledge of the close proximity of the track to the trolley pole. *Elliott v. Newport St. R. Co.*, (R. I.) 31 Atl. Rep. 694.

Same—Same—Failure to Listen for Warnings.—A passenger riding on the foot-board of a trolley-car by permission of the company is under no duty to listen for a warning as to the danger of striking poles, and cannot be charged with contributory negligence unless the warning was actually heard by him, or unless he had knowledge of the danger of being struck by a pole. *Elliott v. Newport St. R. Co.*, (R. I.) 31 Atl. Rep. 694.

Same—Failure to Discover Bolt in Alighting from Car.—That a passenger about to leave a street-car knew of, or might have discovered, a bolt upon which she caught her dress in her haste in endeavoring to alight, is not negligence, but is merely evidence to prove negligence. *North Chicago St. R. Co. v. Eldridge*, 151 Ill. 542.

Same — Alighting from Cable-car which has Stopped to Allow Passage of Car on Intersecting Line.—Attempting to alight from a cable-car which has stopped to allow a car on an intersecting street to pass in front of it, instead of waiting until it reached the other side of the street, is not such negligence as will bar a recovery, unless it was the proximate cause of the injury. *North Chicago St. R. Co. v. Eldridge*, 151 Ill. 542.

Same—Boarding Detached Car after Warning.—Where an open passenger-car is standing on the track, not coupled to the rest of the train, and the conductor warns a passenger not to enter the car until it has been coupled and moved to a point exactly opposite the depot,

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it is contributory negligence for the passenger to enter the car before it has been coupled and moved to the point designated, and this is true though the car, before it was coupled and moved was standing at the place where passengers usually board trains. *Tillett v. Lynchburg & D. R. Co.*, 115 N. Car. 662.

Same—Intoxication—A passenger voluntarily intoxicated is chargeable with like care to avoid injury as a sober person of ordinary prudence under similar circumstances. *Johnson v. Louisville & N. R. Co.*, (Ala.) 16 So. Rep. 75.

Same—Failure to Avoid Injury by Bell-rope.—In an action against a railroad company for personal injuries sustained while on a special or private car by invitation of the general agent of the defendant, it appeared that plaintiff was struck in the right eye by the bell-cord of the train, when suddenly drawn taut through the car, whereby his eye was severely injured. *Held*, that the bell-rope which caused the injury was pulled negligently and violently; that the passenger, who at one time saw the rope, and moved away from it, was not guilty of contributory negligence from the fact that immediately after he did not, a second time, move away from it; he then being engaged in examining a profile sketch of the levees he held in his hands, and unmindful of the bell-rope; that the rope was not where it should have been; and that in pulling it taut, care should have been taken not to pull it violently and injure a passenger. *Thompson v. Yazoo & M. V. R. Co.*, 47 La. Ann. 1107.

Same—Going to Sleep in Caboose after Breaking up of Freight Train.—The fact that a passenger in a caboose which with two other cars had broken loose from the train, assuming that the broken-off part would be picked up in a proper manner, went to sleep, will not as a matter of law constitute contributory negligence. *Delaware, L. & W. R. Co. v. Ashley* (U. S. Cir. Ct. App. 3 Cir.), 67 Fed. Rep. 209.

Same—Leaving Car to Escape Apparent Danger—Error of Judgment.—A person riding on a street-car who suddenly realizes that he is in danger, is not guilty of error of judgment in acting in what appears to him to be an emergency. *Denver & B. P. R. T. Co. v. Duyer*, 20 Colo. 133.

Same—Same.—Independent of the statutory rule, a passenger who is placed in a position of apparent imminent peril through the negligence of a carrier may recover for injuries received while endeavoring to escape, in obedience to the natural instinct of self-preservation, provided he exercise ordinary prudence in view of the circumstances as they appear to him at the time. *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448.

And such is the rule, although it subsequently appears that the danger was apparent only, and not real; since the carrier whose negligence is the proximate cause of the injury cannot complain, on the ground that passengers err in their estimate of the danger con-

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fronting them, or the choice of means to insure their safety. *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448.

Same—Same—Liability of Company.—Where a person operating a horse-railroad has provided a perfect track, car and harness in good repair, and a skilful driver, alert and at his post, he is not liable for injuries sustained by a passenger, who, becoming frightened because the horses become temporarily unmanageable by fright at passing objects, jumps from the car and sustains injury. *Perry v. Malarin*, 107 Cal. 363.

Same—Voluntary Exposure to Danger—Duty of Company to Avoid Injury.—Although a person injured while riding on the steps of a street-railway car may have been guilty of contributory negligence, yet if the defendant having knowledge of his exposed condition, by the exercise of ordinary care could have prevented the injury it was its duty to do so, and for failure so to do is liable. *Denver & Berkeley P. R. T. Co. v. Dwyer*, 20 Colo. 132.

Same—Same—Same.—The general rule that a party sustaining personal injuries cannot recover damages therefor if his own negligence contributed to the injury applies without qualification in all cases where the party inflicting the injury is not chargeable with negligence indulged after the position of the injured party was discovered, or, by the exercise then of reasonable care, could have been discovered. *Texas & P. R. Co. v. Nolan*, (U. S. Cir. Ct. App. 5 Cir.) 62 Fed. Rep. 552.

Doctrine of Comparative Negligence—Illinois.—The doctrine of comparative negligence by the recent decisions in Illinois has been greatly modified, if not wholly repudiated. *North Chicago St. R. Co. v. Eldridge*, 151 Ill. 542.

Presumption as to Passenger's Knowledge of Incidents of Railway Travel.—Railway passengers are presumed to know the everyday incidents of railway travel. *Jacob v. Flint & P. M. R. Co.*, (Mich., 1895) 63 N. W. Rep. 502, *citing* *Mitchell v. Railroad Co.*, 51 Mich. 236, 12 Am. & Eng. R. Cas. 163; *Minnock v. Railroad Co.*, 97 Mich. 425.

Imputation of Negligence of Driver of Street-car.—The negligence of the driver of a street-car will not be imputed to a passenger on the car. *Gulf & S. F. R. Co. v. Pendery*, 87 Tex. 553.

NOTES

(1) p. 299] **Contributory Negligence of Passenger—What Constitutes.**—The duty of a carrier of passengers does not extend to the imprisonment of a passenger so as to prevent him from voluntarily exposing himself to needless peril. *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82.

A passenger upon a railroad train is bound to use ordinary care to avoid injury, and if by a failure to do so he directly contributes

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to the injury, he cannot recover. *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228.

A railroad company is not bound to so protect the windows of its cars that a passenger cannot get his limbs through them. Where, therefore, an injury results to a passenger from the fact that his arm is extended by him several inches outside the window of a car whereby it comes in contact with the structure of a water-tank properly placed beside the track, the carrier is not liable. *Louisville & N. R. Co. v. Sickings*, 5 Bush. (Ky.) 1.

If a passenger of mature years voluntarily or inattentively projects his elbow or arm out of the window of a railroad car in which he is travelling, and it is injured by coming in contact with a freight car standing on a siding or other obstruction near the main track of the railroad, he is not entitled to recover damages for such injury from the railroad company. The placing of an arm out of the window of a railroad train, when in motion, is an act of contributory negligence, and the court should so instruct the jury as a matter of law, notwithstanding the company may have been guilty of negligence in the case above stated in permitting the car on the siding to be placed too near the track of the passing train. *Pittsburgh & C. R. Co. v. Andrews*, 49 Md. 329.

The voluntary projecting, by a passenger on a railroad train, of his arm through the open window of a car, whereby injury is suffered, is in law gross negligence, which contributes to the injury and which will preclude him from any right of recovery, unless he can show gross negligence on the part of the railroad company, its agents or servants, for gross misconduct, it is legally responsible, or that the injury was intentionally done, or that it could have been avoided by ordinary care. *Louisville & N. R. Co. v. Sickings*, 5 Bush. (Ky.) 1, *citing* *Pittsburgh & C. R. Co. v. McClurg*, 56 Pa. St. 295; *Todd v. Old Colony R. Co.*, 3 Allen 207; *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 288; *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82; *Telfer v. Northern R. Co.*, 30 N. J. L. 190.

Where a railroad passenger puts his elbow or arm out of a window of the car, voluntarily and without any qualifying circumstances impelling him to it, it is negligence *in se*. And where that is the state of evidence, it is the duty of the court to declare such act of the passenger negligence in law. *Pittsburgh & C. R. Co. v. McClurg*, 56 Pa. St. 294.

Where, in an action, brought by a passenger against a railroad company, to recover damages for a personal injury from the swinging of an unfastened door of another car, standing upon a track parallel to that over which he was riding, it appeared from the plaintiff's own testimony that his elbow extended through the open window of the car beyond the place where the sash would have been if the window had been shut; it is the duty of the court to rule that this is such carelessness as will prevent a recovery of damages by

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him, and to withdraw the case from the jury. *Todd v. Old Colony & F. R. Co.*, 7 Allen (Mass.), 207, *affirming* 3 Allen, 18.

In an action to recover for personal injuries, if the facts are undisputed, and fail to show that the plaintiff was in the exercise of due and reasonable care at the time of receiving the injury, it is the duty of the court to instruct the jury that he cannot recover. *Gavett v. Manchester & L. R. Co.*, 82 Mass. 501.

The facts upon which the foregoing rule was laid down showed that a passenger in a railroad car, with knowledge that the train was in motion, went out of the car and stepped upon the platform of the station while the train was still in motion, and was held to be so wanting in ordinary care as not to be entitled to maintain an action against the company for an injury resulting from his act.

"A passenger, on entering a railroad car, is to be presumed to know the use of a seat, and the use of a window; that the former is to sit in, and the latter is to admit light and air. Each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy—but not to occupy. Its use is for the benefit of all, not for the comfort of him who alone has by accident got nearest to it. If, therefore, he sit with his elbow in it, he does so without authority; and if he allow it to protrude out, and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there; nor misled in regard to the fact that it is not a part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is, therefore, without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken without his ability to know whether there is danger or not approaching. In a case, therefore, where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken, in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so to be pronounced by the court. Wherever the facts present such a case singly, and without any controlling or justifying necessity, we think the court ought to declare the act negligence; and as there was nothing like this shown in the case before us, we think the court ought not to have affirmed the plaintiff's point. Unconsciously exposing himself did not help the plaintiff's case, as it was not shown that this unconsciousness was not the result of a want of prudent attention to his situation on part of the plaintiff. It would be a novel answer to the allegation of negligence, to allege that the plaintiff had slept in the position he was in when hurt; and that would be a condition of unconsciousness. Sleeping when due care would require one to be awake, or in dangerous circumstances, is negligence, and no answer to the company can be given to such act. Of course these views are predicated on a case in which there are no facts to qualify or justify the act. It is possible that a state of facts might be found to show an exception to the rule, and where that occurs, the rule ceases. In conclusion we have simply to reassert, that where a traveller puts his elbow or an arm out of a car window, voluntarily, with any qualifying circumstances impelling him to do it, it must be regarded as negligence *in se*; and when that is the state of the evidence it is the duty of the court to declare the act negligence in law." *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294.

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In *Western Maryland R. Co. v. Stanley*, 61 Md. 266, 18 Am. & Eng. R. Cas. 206, a passenger upon a railroad train, sitting close to the front door of a crowded car, when the train was going through a tunnel, attempted to shut the door, while the car was in total darkness, in order to keep out the smoke and cinders; in so doing he was injured. In an action for damages brought by him against the railroad company, it was held, (1) That all the facts and circumstances taken together would warrant a finding of negligence on the part of the defendant, and justify a verdict for the plaintiff, unless the plaintiff's conduct amounted to contributory negligence; and (2) that the court below properly refused to instruct the jury that the plaintiff was chargeable with contributory negligence.

Where a passenger is guilty of a reckless attempt to leave a train, when in motion, no recovery can be had, although the company may have disregarded a duty imposed by law, in failing to stop at the station where the passenger desired to alight. *Dougherty v. Chicago, B. & Q. R. Co.*, 86 Ill. 467. *Citing* *Jeffersonville R. Co. v. Swift*, 22 Ind. 450; *Pennsylvania R. Co. v. Chappel*, 23 Pa. St. 147.

The stepping or riding upon the front platform of a horse-car when in motion is not of itself negligence. *McDonough v. Metropolitan R. Co.*, 137 Mass. 210, 21 Am. & Eng. R. Cas. 354; *citing* *Meesel v. Lynn & Bos. R. Co.*, 8 Allen, 234; *Fleck v. Union R. Co.*, 134 Mass. 480, 16 Am. & Eng. R. Cas. 372.

Illinois Rule.—In Illinois a modification of the general rule has been established, and it is there held that the negligence of a passenger travelling on a railroad car in permitting his arm to rest on the base of a window of the car, and slightly projecting outside, whereby his arm is broken in passing a freight train, is slight as compared with the negligence of the railroad company in permitting its freight cars to stand so near the track upon which its passenger train is running, that such injury might result, and therefore a recovery may be had for injuries thus sustained. *See* *Chicago & A. R. Co. v. Ronsden*, 51 Ill. 333, which directly *reject* *Pittsburgh & C. R. Co. v. McClurg*, 56 Pa. St. 214, and *citing* *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478; *Chicago & R. I. R. Co. v. Still*, 19 Ill. 479; *St. Louis & A. R. Co. v. Todd*, 36 Ill. 409; *Chicago & A. R. Co. v. Hogarth*, 38 Ill. 370. The court in the first case cited admits that the courts of other states have adopted and act upon a different rule, but regard the question as above stated as being firmly established in Illinois.

Same—Obvious Danger Incurred at Direction of Servants of Company.—Where danger is obvious, a passenger upon a railroad car is not excused if he occupies a place of danger, even by order or permission of the defendant's servants. *Railroad Co. v. Jones*, 95 U. S. 443; *South & N. A. R. Co. v. Schaufler*, 75 Ala. 136, 21 Am. & Eng. R. Cas. 405.

Consequently in an action against a railroad company to recover damages resulting to the plaintiff by reason of injuries received by

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him in leaping from defendant's train of cars while the cars were in motion, at a station where the train did not stop, it was held that even if the plaintiff leaped from the car on the suggestion of the conductor, and the conductor only gave it as his opinion that the plaintiff could leap from the train in safety, it was his duty to exercise his judgment whether or not it was safe; and if the danger was so apparent that a prudent man similarly situated would not have attempted the leap from the train, then the plaintiff was guilty of negligence, and should not be permitted to recover. The plaintiff, if left to act voluntarily, and not under constraint, was bound to exercise ordinary prudence. *The Chicago & A. R. Co. v. Randolph*, 53 Ill. 510.

Same—Contributory Negligence of Passenger—When Overcome by Greater Negligence of Carrier.—Although there may have been negligence on the part of plaintiff, yet, unless he might, by the exercise of ordinary care have avoided the consequences of defendant's negligence, he is entitled to recover. *Lucas v. New Bedford & Taunton R. Co.*, 72 Mass. 64; *citing* *Bridge v. Grand Junction R. Co.*, 3 M. A. W. 248; *Davis v. Mann*, 10 M. & W. 549; *Theorgood v. Bryan*, 8 C. B. 115; *Clayards v. Bethrick*, 12 Ad. & El. (N. R.) 439; *Moore v. Central R. Co.*, 24 N. J. L. 268.

Where the evidence shows that a passenger was injured while seated in his seat in a railroad car and resting his head on his arm, which rested on the window sill of the car, by the car coming in contact with the corner of a wrecked car which had not been sufficiently removed from the track, it was held that there was no proper case made by the evidence for an instruction upon the subject of contributory negligence. *Winters v. Hannibal & St. J. R. Co.*, 39 Mo. 468.

In *Spencer v. Milwaukee & P. C. D. R. Co.*, 17 Wis. 493, it was held that where a passenger, who, while the train was going over a bridge had his hand outside of the car window, in consequence of which it came in contact with a brace in the bridge which had become loosened and dropped downward, whereby the hand was injured, there was no negligence on the part of the plaintiff, but that the company was negligent, and responsible for the injury caused.

Same—Instinctive Efforts of Passenger to Avoid Injury—Whereby Injury Resulted—Effect.—Passengers in positions of great peril are not required to exercise all the presence of mind and care of a prudent, careful man; the law makes allowances for them, and leaves the circumstances of their conduct to the jury. *Galena & C. R. Co. v. Yarwood*, 17 Ill. 509.

Or, as was stated in *Adams v. Hannibal & St. J. R. Co.*, 74 Mo. 553. 7 Am. & Eng. R. Cas. 414, one in a perilous position is not to be held to the exercise of the same care and prudence as if he were in a place of safety.

An instinctive injurious effort to escape a sudden peril from the

Injuries—Contributory Negligence Notes

negligence of another, does not therefore relieve the latter from liability. *Coulter v. American Merc. Un. Exp. Co.*, 56 N. Y. 585.

Nor will an error of judgment on the part of a person placed in a position of imminent danger by the negligence of another, render such person guilty of contributory negligence. *Stevenson v. Chicago & A. R. Co.*, 5 McCrary (U. S.) 634; *Mark v. St. P. & C. R. Co.*, 30 Minn. 493; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Roll v. Northern Cent. R. Co.*, 15 Hun, 496; *Schultz v. Chicago, etc., R. Co.*, 44 Wis. 638.

If, through the default of a railroad company, or its servants, a passenger is placed in such a perilous position as to render it an act of reasonable precaution, for the purpose of self-preservation, to leap from the cars, the company is responsible for the injury resulting therefrom, although, if the passenger had remained in the car, he would not have been injured. *Southwestern R. Co. v. Paulk*, 24 Ga. 356.

Same—Province of Jury.—The question of contributory negligence on the part of the plaintiff, in an action for personal injuries inflicted upon him through the negligence of a railroad company of which he was a passenger, is one of fact for the determination of the jury. *Allender v. Chicago, I. & P. R. Co.*, 37 Iowa, 264.

Whether the acts or omissions of a party constitute contributory negligence depends upon the circumstances in each case and is a question for the jury. *Galena & C. U. R. Co. v. Yarwood*, 15 Ill. 468, s. c. 17 Ill. 509.

A rash and undue apprehension of danger on the part of a passenger may or may not justify his act in seeking to avoid injury by leaping from the train or otherwise as without culpability. It is not to be expected that passengers, under circumstances of apparent peril and excitement, and frequently of great confusion, can exercise any great care, or calmness and deliberation. All must be left to a jury. See *Jones v. Boyce*, 1 Stark, 493; *McKinney v. Niel*, 1 McLean, (U. S.) 540; *Stokes v. Saltonstall*, 13 Pet. 181; *Ingalls v. Biles*, 9 Met. (Mass.) 1.

In an action against a carrier for injuries to a passenger caused by the negligence of the carrier, the court should not give instructions upon the subject of plaintiff's contributory negligence, unless warranted in doing so by the evidence. *Winter v. Hannibal & St. J. R. Co.*, 39 Mo. 468.

CLARK (James E.)

v.

CHICAGO & ALTON R. CO.

(*Supreme Court of Missouri, May 5, 1895.*)

Injury to Passenger by Collision [(1) p. 317]—Burden of Proof of Negligence.—Where the proof shows that a passenger was injured by a collision resulting from the stoppage of defendant's train on the track of another company and across it, the burden of showing that the injury was not caused by its negligence is on the defendant. (*Page 312.*)

Same—Collision at Crossing of Intersecting Line—Failure to Warn or Look Out for Approaching Train.—A finding of negligence of a railroad company, whereby a passenger sustains injury, is warranted by proof that it stopped the train in question at midnight upon the line of another road crossing its own, and allowed the train to remain there for five minutes before the collision which caused the injury, without posting flagmen to warn approaching trains on the intersecting line, or requiring its employes to listen for their approach. (*Page 314.*)

Stoppage of Train on Track of Intersecting Line—Application of Statute Forbidding Stoppage at Crossings.—A statute forbidding railroad companies to obstruct any public highway by stopping any train upon its track where the same crosses a public highway, except for the receipt or discharge of passengers, etc., has no application to the stoppage of a train upon the tracks of an intersecting road. (*Page 314.*)

Same—Collision [(1) p. 317]—Failure of Colliding Train to Stop Before Crossing Intersecting Line in Compliance with Statute.—A railroad company stopping one of its trains on the track of an intersecting line, whereby it is struck by a train running on such line, cannot relieve itself from liability for injury thereby resulting to a passenger, because of the failure of the employes on the other train to comply with a statute requiring trains on intersecting roads to come to a full stop before crossing the tracks of the other line. (*Page 316.*)

Action for Injury to Passenger—Excessive Damages.—A verdict of \$7500 is not so excessive as to indicate passion or prejudice on the part of the jury, where it appears that the passenger injured was the member of a firm doing a business of \$750,000 a year, and had charge of its finances; that his surgical treatment had cost \$750; that he suffered great pain and inconvenience, was undergoing treatment, that a surgical operation was still necessary, and that the trouble might be permanent. (*Page 316.*)

Appeal from St. Louis Circuit Court. *Affirmed.*

R. H. Kern and John A. Bellatti, for appellant.

Geo. W. Bailey, for respondent.

Injuries—Collisions

Clark v. C. & A. R. Co.

GANTT, P. J.—On the night of December 3, 1890, James E. Clark, the plaintiff, was a passenger on one of the defendant's trains travelling from Chicago, Ill., to Kansas City, Mo.

Facts. It was a fast train, known as the "Hummer." He purchased his ticket in Chicago, and retired to sleep in one of the sleeping-cars of the train. The train reached Jacksonville, Ill., about midnight. At this point the Chicago & Alton Railroad's track extends north and south, and is intersected by the tracks of the Wabash Railroad, which extend east and west. The tracks of each road cross the other at grade. There were two sleeping-cars attached to defendant's train in which plaintiff was a passenger, and he was in the forward of the two. The train reached Jacksonville from 10 to 20 minutes behind time, and a few minutes after midnight. It stopped about 100 or 150 feet from the intersection, and in full view of it, and the engineer, seeing the crossing was clear, drew his train into the station and stopped. When it stopped the locomotive was 30 to 50 feet north of the south end of the depot platform, and the two sleeping-cars and about 20 feet of the north end of the chair car, comprising at least 160 feet of the train, were left standing north of the intersecting Wabash Railroad track. There was no physical or other reason which rendered it absolutely necessary to stop the train with a portion of it north and the other part south of the Wabash track, but it was a matter of convenience in handling baggage, freight, and express matter, and discharging passengers at the depot, and on the platform. The platform could have been made longer without interfering with any other highway. No flagmen were stationed on the Wabash track or elsewhere to keep a lookout for the Wabash train, which was an hour and a half late that night.

There was much evidence that the Wabash train whistled three times in the mile and a half east of the station as it approached, and no one connected with defendant's train heard any but the last signal, which was given a few seconds before the collision. While this train was thus standing across the Wabash track, a Wabash freight train, consisting of 19 cars loaded with coal, and going west, collided with defendant's train, crushing through the sleeping-car "Matterhorn," in which plaintiff was asleep, cutting the car into two parts, between the centre and the north end, killing

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two of the passengers and wounding several, and inflicting the injuries to plaintiff for which this action was brought.

The petition seeks to recover the damages plaintiff has suffered by defendant's failure, through negligence, to safely carry plaintiff from Chicago to Kansas City, as it had, as a common carrier, agreed to do, in that it

Petition.

"negligently, carelessly, needlessly, and with a reckless disregard of the rights and safety of plaintiff and its duty to him, placed said train of cars, one of said cars being the sleeping-car in which plaintiff was asleep and unconscious, directly upon and across the railway and right of way of the said Wabash Railroad Company, and carelessly, negligently, unlawfully, needlessly, and with a reckless disregard of plaintiff's rights and safety, and of defendant's duty and obligation to plaintiff as its passenger, there permitted said train to stand, remain, and unlawfully and negligently obstruct, and for an unusual and dangerous and unreasonable length of time stand across, said Wabash tracks and right of way, and thus carelessly exposed said train and plaintiff to the imminent danger and peril of collision with the trains of the Wabash company, and, while thus standing upon and across the right of way of the Wabash Railroad Company, defendant negligently suffered said train and sleeping-car to be violently struck, run into and upon and against and through by a locomotive and cars of the Wabash Railroad Company, and said sleeping-car crushed, shattered, and cut in two parts, demolished and wrecked; that plaintiff's person was caught and became entangled in said wreck, and plaintiff was crushed and bruised, and severely injured, and rendered unconscious thereby, and, while so unconscious, was knocked or carried in said wreck, by said locomotive, several yards distant, and finally tossed upon a bed of snow and ice which was then and there existing beside said railroad tracks of said Wabash Railroad Company, where he lay unconscious until picked up by bystanders and taken into the railway station of defendant for protection and medical attention."

Plaintiff alleges that the direct and proximate cause of said collision was the failure of the agents, servants and employés of the defendant to exercise due and even ordinary diligence and precaution to prevent the same, and the failure of the agents, servants, and employés of defendant to

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exercise that degree of precaution which, if exercised, would have rendered said collision impossible; that the agents, servants, and employes of defendant could have prevented said collision by the exercise of even due and ordinary diligence after they had discovered, or might have discovered by the exercise of ordinary care, the peril and danger to which the plaintiff was exposed by the conduct of the agents, servants, and employes of said Wabash Railroad Company, but failed to exercise the same."

Plaintiff states that by reason of said collision, and as a result thereof, his body was severely wounded, bruised, contused, and wrenched, both externally and internally, and that his spinal column was particularly wrenched and permanently injured, and that he suffered great bodily and mental pain as direct results of said injury and collision, and was confined to his bed and room, by reason thereof, for long period of time, to wit, for the period of about three months; that by reason of said injury he was disabled and prevented from attending to his business affairs and interests for the space of over six months, and from giving but partial attention to the same for the space of over one year, and that ever since said injuries he has been, and still is, unable to give ordinary or usual attention to the same; that ever since said accident, and as direct results thereof, and by reason of said injuries he has suffered, and will continue to suffer, great bodily pain, annoyance, inconvenience, and expense; that as direct result of said injuries and collision he was compelled to procure, and did procure, necessary medical attention, and services and treatment which then were necessary, and still are, and will continue to be necessary for an indefinite period, and that on account of said services alone he has been put to the expense of about the sum of eight hundred dollars.

"Plaintiff states that by virtue of the premises he has been injured and damaged in body, mind, health, pain, and suffering, loss of time, and necessary expenses, in the sum of twenty thousand dollars, for which sum, together with his costs in this behalf expended, he prays judgment against said defendant."

The defendant in its answer admits that it was a common carrier as alleged, and pleads that, under the laws of the

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state of Illinois in force then, all railroads were made public highways, among others the said Wabash Railroad Company; that as such they were required to maintain depots for the transaction of their business by the laws of the state of Illinois, and that all trains approaching the crossing of another railroad on the same level were required to come to a full stop before reaching the same, within 800 feet therefrom, and the duty of the engineer was to see before he crossed that the way was clear, and that the train could safely proceed; that a railroad could obstruct any public highway by stopping its train thereon for the period of not longer than 10 minutes, for the purpose of receiving and discharging passengers; that it must provide cars for receiving passengers at its junction with other railroads, and stop its cars at all stations advertised as places for receiving and discharging passengers; that this depot was jointly used by the Wabash Railroad Company and itself; that it was its duty, under the laws aforesaid, to stop its trains at this depot long enough to receive and discharge passengers, etc., there; that the city of Jacksonville was then one of the regular stations on its road; that it stopped its train no longer than was necessary to receive and discharge passengers, etc., there; that in doing this it was compelled to stop its train over the tracks of the Wabash Railroad, and as soon as it had discharged its duty, and before the collision, it had started promptly to remove its train in which plaintiff was a passenger, and that the injury was caused simply and entirely by the negligence of said Wabash Railroad Company in not complying with the aforesaid law by stopping its railroad train within a distance of 800 feet, or any nearer distance, of the aforesaid crossing of the two said railroad companies' tracks at its said depot at Jacksonville, Ill.

The replication is a general denial.

There was a trial in the circuit court of the city of St. Louis, and a verdict for \$7500 for plaintiff, from which defendant appeals.

The grounds urged in this court to reverse the judgment are: First. The court erred in giving instruction No. 13, which is as follows: "(13) The jury is instructed by the court that if the jury believe from the evidence that plaintiff was a passenger, lawfully on board of the defendant's train, at the time of the collision appear-

Answer.

Errors
assigned.

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ing in evidence, and received injuries therein, then the burden of proof is shifted upon the defendant to show to the satisfaction of the jury that said collision was caused through no fault, negligence, or carelessness of defendant's agents, and unless it is so shown the jury should find a verdict for plaintiff."

Second. The court erred in refusing instructions asked by defendant and numbered 4, 5 and 11.

Third. Damages awarded plaintiff excessive.

Fourth. In giving instructions Nos. 4 and 5 as modified.

Fifth. That the court erred in not sustaining a demurrer to the evidence.

The obligation of a steam-railway carrier to its passengers is, as far as it is capable by human care and foresight, to carry them safely, and it is responsible for all injuries resulting to its passengers from any, even the slightest, neglect; and when the passenger suffers injury by the breaking down or overturning of the coach the *prima facie* presumption is that it was occasioned by some negligence of the carrier, and the burden is cast upon the carrier to rebut, and establish that there has been no negligence on its part, and that the injury was occasioned by inevitable accident or by some cause which human precaution and foresight could not have averted. *Lemon v. Chanslor*, 68 Mo. 340; *Furnish v. Railway Co.*, 102 Mo. 438.

This degree of care is sometimes expressed to be "the highest degree of care of a very prudent person in view of all the facts and circumstances at the time of the alleged injury." *O'Connell v. Railway Co.*, 106 Mo. 482; *Waller v. Railroad*, 83 Mo. 608. Again it is expressed to be "the utmost care and skill which prudent men would use and exercise in a like business and under similar circumstances." *Jackson v. Railway Co.*, 118 Mo. 199; *Smith v. Railroad Co.*, 108 Mo. 243, 52 Am. & Eng. R. Cas. 483; Redf. Carr. § 347. The various formulas amount to the same thing in principle. Carriers are not insurers of the absolute safety of their passengers, nor are they responsible for inevitable and unavoidable accidents, but a just regard and solicitude for the safety of human life and limbs has led to the adoption and maintenance of the above rule.

We do not understand the learned counsel for defendant to question the rule itself, but they contend that the thir-

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teenth instruction given for plaintiff was and is erroneous in (they assert) that it declared the law to be that when the plaintiff showed that he was injured on this occasion it shifted the burden of proof from him to the defendant.

Counsel argue that both the pleadings and plaintiff's own evidence show that this collision was caused by a force beyond the control of the carrier, to wit, the tortious act of the Wabash Railroad, and that in such a case the plaintiff is required, in order to make out a *prima facie* case, to go further and prove the actual negligence of defendant as an operating and efficient cause of the injury.

We think the court clearly did not err in this regard. The burden was shifted upon defendant by this instruction if the jury should find plaintiff was lawfully on board the defendant's train "at the time of the collision appearing in evidence, and received injuries therein." Burdens of
Proof—Con-
tinued.

The admitted and uncontroverted facts in evidence disclosed that plaintiff was lawfully on board of defendant's train, and asleep in a car provided for passengers who desired to sleep; that "the collision appearing in evidence" occurred just after midnight; that defendant's servants and trainmen in charge of the train in which plaintiff was asleep stopped said train across the track of another intersecting railroad, and kept said train standing for five minutes exposed to the danger of collision with the trains of the Wabash Railroad, and without taking any precautions for guarding said train against the danger of a collision with a train on the Wabash; and that a Wabash train did run into and collide with said train of defendant, whereby plaintiff was hurt, without any fault on his part whatever. That is to say that the admitted facts which proved the injury also proved defendant's negligence, and developed the circumstances from which negligence was necessarily presumed. The doctrine of *vis major*, or the tortious act of a stranger producing the injury, has no application in this case.

The law is that "the burden of proof is upon the defendant where the accident proceeds from an act of such a character that when due care is taken in its performance no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement of a thing over which the defendant has immediate control, or for the management or construction of which he is responsible." Booth, St Ry.

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Law, § 361; Meier v. Railroad Co., 64 Pa. St. 225; Coudy v. Railroad Co., 85 Mo. 85, 27 Am. & Eng. R. Cas. 282.

Here the train which stopped in a known place of danger was entirely under the control of defendant's agents or servants, and by their mismanagement they voluntarily suffered that train to stand in a position where it was liable to be struck by trains of the Wabash Railroad. To escape liability on the ground of vis major, or the tortious act of a third person, it devolved upon defendant to show that it was guilty of no fault in falling into the danger; but all the testimony showed that defendant, with a reckless disregard of the lives of those committed to its keeping, placed them in a position of recognized peril. It sacrificed the lives and bodies of its confiding and sleeping passengers to a mere matter of convenience. To escape responsibility for this, it pleads the negligence of the Wabash Company in not stopping its train before reaching the point of intersection, forgetting that as to its passengers, before it can avail itself of the negligent act of the Wabash, its own negligent act must not have also contributed to the injury.

We think the circuit court, upon this showing, correctly assumed that, under the admitted facts of this case, the defendant was *prima facie* guilty of negligence *per se* in stopping and holding its train across the track of the Wabash.

About the recklessness of such an act at midnight, with a train load of sleeping passengers, we do not think reasonable men can or ought to differ. There was no controlling necessity compelling it to stop any portion of its train over the crossing, and, if there had been, the most ordinary diligence would have suggested the necessity and duty of posting flagmen in each direction to warn the trains of the other road. Nothing in the statutes of the state of Illinois read in evidence justified, much less required, that defendant should expose its train to that collision. The right to cross is one thing; the right to stop and obstruct another railroad is quite another thing.

The statute forbidding the railroads of Illinois to obstruct any public highway by stopping any train upon or by leaving a car or locomotive engine standing on its track where the same crosses such public highway, except for the purpose of receiving or discharging passengers, or to receive necessary fuel and water, and in no case to exceed ten minutes for each train or engine,

Negligence—
Failure to
warn ap-
proaching
train.

Statute for-
bidding
stoppage at
crossings.

has no application to railroads. " Railroads are not common highways in the sense of public wagon roads, upon which every one may transact his business with his own means of conveyance, but only in the sense of being compelled to accept of each and all, and to take and carry to the extent of their ability," as common carriers. *Railroad Co. v. Rockafellow*, 17 Ill. 541; *Hyde v. Railroad Co.*, 110 Mo. 272, 54 Am. & Eng. R. Cas. 157; *Farber v. Railway Co.*, 116 Mo. 81; *Wood, R. R.* pp. 2-4.

But it is very plain that there is nothing in this mere police regulation, adopted to prevent the unnecessary blocking of streets and roads, that can absolve the defendant from its obligation as a common carrier of passengers to observe the utmost care and precaution which very prudent men would use and exercise under similar circumstances.

In addition to leaving its train over the Wabash track, without sending out a flagman to observe the approach of a train on that road, the peculiar topography of the country at this point is such that had any of the employés been required even to listen for a train this terrible misfortune might have been averted. The evidence discloses that the whistle of a train on a clear, cold night, as the one on which the collision occurred, could be easily heard for two miles,—perhaps three or four. It was shown that the Wabash engineer gave three signals for brakes within a mile of the intersection at which this collision occurred, and the whistle for the station was given a little over a mile distant. None of these whistles, except the last, which was given only a few seconds before the disaster, was heard by any of the train crew. It further appeared that the headlight of the Wabash train was shining, and that it could be seen for a mile, at least. There was also evidence that the rumble of the Wabash train on such a night could easily be heard for two miles, but was not heard by any employé on the Chicago & Alton train until about 75 yards distant from the crossing. It is out of the question, under this testimony, to claim that a demurrer to the evidence should have been sustained.

Little need be added as to the assignments on the fourth and fifth instructions as amended. Without the qualification added by the court, they assert the bold proposition that defendant had a right to assume that the Wabash train would

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obey the law of Illinois, and come to a stop before reaching the intersection of the two roads, and that it could safely rely upon this assumption, without exercising any care whatever to guard against any misunderstanding of orders by employés of that road, or defective machinery that might render it impossible to stop a train as required by the statute. In other words, this carrier, of whom the law exacted such a high degree of prudence in caring for the safety of those who had committed their lives into its keeping, assumed that it might rely for their safety entirely upon the care and prudence of others. But such is not the law. No one has a right to rely entirely upon the obligations of others to observe the law, and himself neglect and disregard the dictates of prudence. He must use reasonable precautions for his own safety, and then, in the absence of information to the contrary, he may act upon the presumption that others will obey the law. The obligation to exercise due care is mutual and correlative. It does not mean that one may disregard all the laws of prudence himself and yet require of his neighbor to observe caution in protecting him against his own imprudence. *Lynch v. Railway Co.*, 112 Mo. 420, 56 Am. & Eng. R. Cas. 571; *Weller v. Railway Co.*, 120 Mo. 635.

There was no error in qualifying the instructions. Indeed, we doubt their propriety at all, under the facts in evidence. The whole theory of these two instructions is wrong when applied to this case. The defendant's obligation grew out of a contract of carriage. Granting that the collision would not have happened but for the negligence of the Wabash, it is clear it would not have occurred but for the concurring negligence of defendant in leaving its train standing, unguarded and unprotected, across the Wabash track. By so doing it violated its contract, and became liable for the injury resulting from that breach. *Kellow v. Railway Co.*, 68 Iowa, 470, 21 Am. & Eng. R. Cas. 485.

Finally, we are asked to reverse because the damages are excessive. The trial occurred over two years after the injury was inflicted. The verdict was for \$7500. Unless it is apparent that the verdict is the result of passion, prejudice, or evident mistake, the verdict will not be disturbed in this court. The evidence established that the plaintiff at the time of the accident was a

Measure of
damages.

leather merchant. He was a member of the firm of Clark, Van Tassel & Co., of Boston, Mass. This house did a business of \$750,000 during the year 1890. He had the management of its finances largely. At the time of plaintiff's injury, he had organized another firm, Wright, Clark & Co. The old firm expired January 1, 1891. His injuries confined him to his bed for a month in St. Louis, and he then returned to Boston. By that time the lower end of the spine, or coccyx, had increased so he could not sit down or lie down with any comfort. He was under medical treatment for three months, at a cost of \$750. He apparently recovered the use of his limbs, and went to work, when the trouble in the coccyx returned. Insomnia followed. He still suffered at the time of trial from pains in the back and up the spine. He was still under the care of a physician. Dr. Graham testified that he would never get relief, in his opinion, until the coccyx was removed by a surgical operation. The physician thought the coccyx was fractured or disjointed,—that it was in a diseased condition. His nervous system shows considerable impairment; has to sleep with a pillow under his back. There was a great soreness at the base of the spinal column. The physician thought the trouble likely to be of long standing, if not permanent. Could not say whether it would be permanent. The plaintiff himself testified fully as to his injuries and the loss of time from his business.

Considering the importance of his services to his firm, and the volume of their business, and the character of his injuries, we cannot say the verdict was so excessive as to indicate passion or prejudice.

We have examined the points made in both briefs for defendant, though this practice is not in keeping with our rules.

The judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

ABSTRACTS OF RECENT DECISIONS

Collisions—Presumption of Negligence Against Company.—On the trial of an action against a railroad company by a passenger for an injury received through a collision of trains, a *prima facie* presumption of negligence arises against the carrier company. *West Chicago St. R. Co. v. Martin*, 154 Ill. 523. *Citing Railway Co. v. Cotton*, 140 Ill.

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Abstracts of Recent Decisions

486, 52 Am. & Eng. R. Cas. 238, Hutch. Carr, § 800; *Skinner v. Railway Co.*, 5 Exch. 787; *Railroad Co. v. Mowery*, 37 Ohio St. 418, 3 Am. & Eng. R. Cas. 361; *Central Pass. Ry. Co. v. Kuhn*, and *Louisville & N. R. Co. v. Kuhn*, 86 Ky. 578, 32 Am. & Eng. R. Cas. 16.

Same—Contributory Negligence—Failure to Discover Approach of Train.—In an action by a passenger on a street-car for injuries sustained by the car being run into by a locomotive, it appeared that at the time of the collision she was sitting with her back to the approaching engine, and it was *held*, that in the absence of some circumstance warning her of approaching danger, she was not guilty of contributory negligence from the mere fact that it was not shown that she exercised any care to discover the approaching train. *Gulf C. & S. F. R. Co. v. Pendery*, 87 Tex. 553.

Proof of Taking Passage—Rebutting Evidence as to Taking Up Tickets.—In an action to recover for personal injuries received in a collision, plaintiff testified that he was a passenger and that his ticket was taken up by a specified conductor, and it was held that an officer of the company might testify to its system of issuing and selling tickets by consecutive numbers, of stamping the tickets with the date of their sale and of the return and preservation of such tickets cancelled by the conductors, and that tickets returned as having been sold and dated on the day of the alleged injury were taken up by a conductor other than the one claimed by the plaintiff to have received his ticket. *Pfaffenback v. Lake Shore & M. S. R. Co.*, (Ind.) 41 N. E. Rep. 530.

Same—Fixing Liability between Companies—Admissibility of a Contract Respecting Precautions at Crossings.—In an action against a street-railway company and a steam-railroad company for personal injuries sustained by a collision, the admission in evidence of a contract offered by the railway company, for the purpose of showing an obligation on the part of the railroad company to take all needful precautions to prevent collisions at the crossings while improper was harmless, where under the allegations of the declaration, the contract imposed no duty which the law did not likewise impose, and consequently the agreement in no wise increased the liability. *West Chicago St. R. Co. v. Martin*, 154 Ill. 523.

Same—Same—Same—Instructions referring to a contract improperly in evidence between a railroad company and a street-railway company, relative to precautions to prevent collisions at crossings, are not substantial reversible error, where it appears that the contract imposed no greater liability than that imposed by the law, and that the jury were not misled. *West Chicago St. R. Co. v. Martin*, 154 Ill. 523.

Same—Instruction as to Failure of Company to Keep Lookout—Invasion of Province of Jury.—An instruction, in an action for personal injuries sustained by the collision of a railroad train and a street-car at a crossing, which in effect declares, as a matter of law, that

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the failure of the servants of the railroad to keep a proper lookout for cars which might be approaching the crossing is negligence, is erroneous as invading the province of the jury. *Gulf & S. F. R. Co. v. Pendery*, 87 Tex. 553.

Same—Instructions—Harmless Error.—Where in an action by a passenger on a street-car against the street-car company and a railroad company for injuries sustained by a collision, an instruction given on behalf of one defendant, is erroneous because of a variance between the declaration and statements in the instruction, there is not reversible error, if the judgment is supported by the evidence, and the instruction is not specifically objected to. *West Chicago St. R. Co. v. Martin*, 154 Ill. 523.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R. Co.

v.

BRYANT (Forest, E., Adm'r of James Davidson).

(*United States Circuit Court of Appeals, Jan. 7, 1895.*)

Liability of Company for Injury to Person on Train at Instance of Unauthorized Employee.—A yard-master off duty, without notice to or authority from the company or any of its officers, appropriated and directed the operation of a train from a point near the shops of the company to a depot for the purpose of enabling himself and other employes of the company to attend a meeting, no charge being made for the transportation. *Held*, that his act was not done in the course of his employment, and his apparent authority being only that of possession of the train, the company was not liable to a person taking passage who sustained injury. (*Page 327.*)

Same—Payment for Extra Time of Engineer Operating Trains.—The mere fact that the engineer and fireman of the train in question were paid for operating the engine as extra time did not amount to a ratification on the part of the company of the acts of the yard-master, where it appeared that the payment was made by direction of the master mechanic, who had no authority respecting the carriage of passengers. (*Page 328.*)

IN ERROR to the United States circuit court for the district of Minnesota. *Reversed.*

Thomas Wilson and *S. L. Perrin*, for plaintiff in error.

F. B. Kellogg, *C. K. Davis*, *C. A. Severance*, *M. D. Munn*, *H. C. Boyeson*, and *N. M. Thygeson*, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

**Injuries to
Passengers**

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SANBORN, Circuit Judge.—The defendant in error, as administrator of the estate of James Davidson, deceased, brought an action in the court below against the Chicago, St. Paul, Minneapolis & Omaha Railway Company, the plaintiff in error, for negligence which he claimed caused the death of Davidson.

He alleged in his complaint that the railway company was a common carrier between the Union Depot in St. Paul and a point near to its railroad shops, about a mile and a half westerly from the depot, and that the deceased was killed by its negligence while it was transporting him as a passenger between these points.

The answer admitted that the company was a common carrier, but denied that at the time of the accident it was a common carrier of passengers between the points named, denied that the deceased was a passenger on any car operated by it at the time of his injury, denied that it was at that time managing or running any passenger-car or cars between those points, and alleged that any injury the deceased suffered was caused solely by his own negligence and the negligence of those who were operating the passenger-coach in which he was traveling.

The case was tried by a jury, and at the close of the testimony the company requested the court to instruct the jury to return a verdict in its favor, on the ground that the evidence was insufficient to justify a verdict against it. The court refused to grant this request, and the jury returned a verdict against the company.

The first question to be considered, therefore, is whether or not the evidence was sufficient to sustain such a verdict.

This was the second trial of this case. At the first trial, the court, at the close of the administrator's evidence, directed a verdict in favor of the company. On a writ of error to this court, the judgment rendered on that verdict was reversed. According to the record then before us, the company's railroad yard extended from the Union Depot to the shops, and included the two points between which the deceased was being transported when he was killed. The company's general yard-master acted as conductor of the train that carried him, which consisted of a switch-engine and a passenger-car that belonged to the company, and the injury was inflicted in its

**Facts on first
trial.**

yard. The engine was operated by one of its engineers, who was paid by it extra hours for running this train on the evening of the accident, and by one of its firemen, under the orders of this yard-master.

On the evening of the accident, this engineer, by direction of the yard-master, went to the shops of the company, and, with the switch engine, drew the passenger coach, filled with employés of the company, from the shops to the Union Depot, where they held a meeting. The deceased rode from a point near the shops to the depot in this coach. After the meeting, and about 10 o'clock in the evening, this coach stood opposite the platform at the depot, on the outgoing west-bound track of the company, in front of the engine. The yard-master invited the employés to board the coach, and the deceased and others did so. This yard-master then directed the engineer to push the coach towards the shops. He did so, and on the way pushed it against some freight cars that were on the track, and Davidson was killed in the collision. There was no evidence that any one paid any fare.

The duties of the yard-master appeared from that record to be to instruct the switchmen what to do, to receive orders from the shipping agents, and to tell the foremen of the crews what to do. There was no evidence that the yard-master was not, at the time of the accident, in the discharge of his duties, as the employé of the company, in operating this train, and none that he was not authorized to transport passengers for it. On this state of facts, we held that the presumption was that one riding in a passenger coach or omnibus, or any other carriage of a common carrier that was palpably designed for the transportation of passengers, was lawfully there by invitation or permission of the employés of the carrier in charge of the vehicle, and that these employés had authority to bind the carrier by such invitation; that these presumptions were not conclusive, and might be rebutted by proper evidence or countervailing circumstances; but that, in the absence of such evidence or circumstances, there was some testimony in that record proper for the jury to consider, on the issue of whether the deceased was a passenger of this company or not. *Bryant v. Railway Co.*, 53 Fed. 997.

The case now presented differs radically from that to which

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we have referred. In the record now before us the following facts are established without dispute: The point near the shops between which and the Union Depot this train moved on the night of the accident was not within the limits of the company's yard, but was about three fourths of a mile west of its westerly limit, and was connected with it by but a single track. The company operated no passenger-cars or trains between these points, and never had operated any, except that, by special order of the superintendent or train despatcher, an excursion train, with a regular conductor, engineer, and brakeman was once or twice operated from the shops to Hudson, Wis., five or six years before this accident, to carry the employes to a picnic. The yard through which this train passed was a freight yard, was used to switch freight cars and to make up freight trains, and the yard-master who ran this train had nothing to do with making up, switching, or running passenger-cars or trains, unless directed to do so in a specific case by a special order of his proper superior, save that, when such trains came through his yard, it was his duty to see that they had a clear track, and to direct engineers who were not familiar with the yard on what tracks they should run their engines; and, save that he occasionally switched an extra passenger-coach in the yard, this yard-master never had any authority to receive or carry passengers for this company, except in one instance, when, by special order of his superiors, he was directed to take the superintendent of the company, on an engine, to Shakopee, a distance of about 25 miles, and except that occasionally, by the special orders of his superiors, he acted as conductor of the regular passenger-train between St. Paul and Merriam Junction, a distance of about 40 miles, when the regular conductors were for some reason unable to act. With these exceptions, he had never carried any passengers for this company before the night of the accident. He was the "day yard-master" in this freight yard. He had no duties to discharge for this company after 6 p. m. At that time he went off duty, and from that time until the next morning the yard was in charge of, and the duties of the yard master were discharged by, another, who was termed the "night yard-master." These duties were so discharged by the night yard-master on the night of this accident. Nevertheless, this day yard-master operated this train between 7

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and 11 o'clock at night, for the purpose of enabling himself and his fellow-servants to ride free to a meeting of their own. He had no authority to run passenger-trains or coaches over this railroad from the company or any of its officers, and none of the officers of the company that had the right to permit such trains to run between the depot and these shops knew that he intended to operate this train until after the accident occurred.

It is not only difficult to discover in this record any evidence to warrant the finding of the jury that the relation of passenger to carrier existed between the deceased, who rode on this wild train, on the invitation of this yard-master, and the company, but the defense of the company that the train he occupied was not operated by the company, but by the yard-master, without authority from or notice to it, seems to be conclusively established by this uncontradicted testimony.

That a yard-master generally has no authority to accept, receive, or carry passengers for his company, or to run any passenger-trains on its railroad, is proved without contradiction. That this particular yard-master never had and never exercised or attempted to exercise any such general authority before this accident, is established by the testimony of the general officers of this company, and is nowhere contradicted. This testimony is confirmed, and the rule it establishes is proved by the instances in which the record shows that he had to do with passenger-trains. They are (1) that when a passenger-train arrived at this yard, whose engineer was not familiar with it, he was required to board the engine, and point out to him the tracks on which he should run his train through the yards; (2) that four or five years before the accident, in two instances, when passenger-trains, with full crews, were ordered by his proper superiors to take the employes from the shops, through this yard, to picnics, he directed the engineers of the trains on what tracks to run them from the shops through this yard; (3) that in 1887, under a special order of his superior, he took the superintendent of the road to Shakopee, a distance of about 25 miles, with a switch-engine; and (4) that, by special orders of his superior, he acted as conductor of a regular passenger-train between St. Paul and Merriam Junction three or four times when the regular conductors were either sick, or in some way unable to act.

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That this yard-master should have been in charge of this yard for years, and in all this time had no more to do with the passenger business of this company than is here disclosed, is very conclusive evidence that he was without authority to interfere with it. Indeed, as soon as the station and general authority of a yard-master of a freight yard are proved, it becomes almost common knowledge that such an employé has no authority to operate passenger-trains over the railroad of his company. That power must necessarily be, and generally is, delegated to a single officer, called the "train despatcher," whose duty it is to know the time and place of each train, and to keep the tracks clear before them. The evidence is that this power was so delegated by this company. The case in hand is a terrible illustration of the confusion and disaster that must necessarily result when another, without the knowledge of this officer, attempts to usurp his authority.

The vital issue in this case was whether or not the deceased was a passenger of this company. The relation of a common

carrier to its passenger is a contract relation. Whether or not such a relation existed between the company and the deceased depends primarily upon the question whether this yard-master must be held to have been the agent of the company when he was operating this fatal train, for the company made no contract to carry the deceased, unless it made it through this man.

That this yard-master had no actual authority to operate this train or make this contract is not denied, but counsel for the defendant in error, in support of their view, invoke the rule that as against third persons the principal is bound by the acts of the agent done in the course of his employment, not only when these acts are within the scope of his actual, but when they are within the scope of his apparent, authority.

This rule, in our opinion, has no application to this case, for two reasons: First, the company never vested this yard-master with any apparent authority to carry passengers on or to run this passenger-train for it; and, second, he did not run this train in the course of his employment for the company, but for his own ends, when he was not engaged in serving his company. There is no doubt that a principal who holds his agent out to the world as the possessor of certain authority may be bound by the latter's acts within the scope of that authority, although he has secretly restricted it to narrower

limits. The reason for the rule that the principal is bound by the acts of the agent within the scope of his apparent authority is that it is inequitable for a principal to induce strangers to enter into contracts with one that he gives the appearance of his agent, and to change their actions and relations on the faith of such agency, and then to deny that the agency was what he made it appear to be. The rule rests upon the principle of estoppel. It follows that the principal is bound only to the extent of the appearance he gives, or knowingly permits the agent to give, or might reasonably expect the agent to give, to the agency, and not by any appearance of agency beyond this that the agent himself wrongfully produces without the knowledge or consent of his principal. It is only acts within the scope of the apparent authority with which the principal clothes the agent, not those within the scope of the apparent authority with which the agent wrongfully clothes himself, without the assent or knowledge of his principal, that are binding upon the latter.

Undoubtedly, the principal in conferring the authority upon his agent must be held to the rule of reasonable foresight, prudence, and care, and may be bound by such acts of the agent as a reasonably prudent man would expect that his agent might appear to have the right to do, from the authority actually given. Tested by this rule, this yard-master never had any apparent authority to carry passengers for this company on a wild train in the night, or in any other way, over any part of this railroad, without orders from or notice to the train dispatcher or some other superior who had the authority to permit and provide for it. The possession and control of the passenger-coach gave him the only appearance of authority to carry passengers that he had, and that coach he took, according to this record, without notice to and without the knowledge of any of the employés of the company who had the authority to permit it to run upon this road. Whatever appearance of authority the possession of this coach conferred upon him, then, was not bestowed upon him by the company, but was produced by his own act, without its knowledge or assent. Nor was there any act or permission of this company that any reasonably prudent man could have foreseen would be likely to confer any apparent authority upon this agent to carry passengers for this company. The general authority of a freight-yard master did not confer it.

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The special authority of this yard-master did not bestow it. The course of business and custom of years had never produced a single instance of its exercise by this employé without a special order from a superior officer who had the proper authority to direct it. How could this company judge of the future but by the past? And who could have anticipated that a servant who had never had any authority to carry passengers, and who in a service of years had never carried one without a special order to do so from his proper superior, would seize a passenger-coach and a switch-engine, and run them, loaded with his fellow-servants, over the busiest and most dangerous part of this railroad, in the night, without notice to train dispatcher, superintendent, or general manager, or any other officer that had authority to permit the passage of such a train or to clear the way for it? In our opinion, no one could have anticipated an act so foolhardy and unusual, and this was not an act within the scope of the apparent authority with which this company clothed this agent.

Moreover, it is a fatal objection to the liability of this company for the acts of this yard-master in operating this train that they were not done in the course of his employment for the company, but for his own ends exclusively, while he was at liberty from his master's service. The master is not liable for an act done by a servant when he is free from his service, and is not attempting to discharge any duty to his master imposed upon him by his employment, but is pursuing his own ends exclusively, even though the act could not have been done without the facilities afforded by his relation to his master.

In *Mitchell v. Crassweller*, 13 C. B. 237, a carman, whose duty it was to put the horse and cart of his master in the stable after the day's work was completed, obtained the keys of the stable for that purpose, and then drove in another direction on his own business, without the consent of his master. On his return he drove his master's horse and cart against and injured a third person, but the master was held to be exempt from liability for this injury.

In *Cousins v. Railroad Co.*, 66 Mo. 572, the superintendent of the company took an idle locomotive from its roundhouse in the night, and ran it 2½ miles for a doctor for a sick neighbor. On the way he carelessly drove the engine upon and

killed the plaintiff's mule. But the supreme court of Missouri held that the company was not liable for the death of the mule.

In *Morier v. Railway Co.*, 31 Minn. 351, 15 Am. & Eng. R. Cas. 135, a case in which an action was brought against the company for damages that resulted from a fire kindled by its sectionmen on its right of way to cook their dinners on a day when they were working for the company before and after their dinner, Judge MITCHELL, of the supreme court of the state of Minnesota, states this rule in these words: "If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, *pro tempore*, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities. 2 Thomp. Neg. 885, 886; Shear. & R. Neg. §§ 62, 63; Cooley, Torts, 533 *et seq.*; Railroad Co. v. Wetmore, 19 Ohio St. 110; Storey v. Ashton, L. R. 4 Q. B. 476; Mitchell v. Crassweller, 13 C. B. 237; McClenaghan v. Brock, 5 Rich. Law 17."

To the same effect are *Campbell v. City of Providence*, 9 R. I. 262, and *Garretzen v. Duenckel*, 50 Mo. 104, 107, 111.

This record brings this case directly under this rule. The yard-master who ran this train ceased the performance of his duties to the company at 6 P. M. on the day of the accident, and was then succeeded in the discharge of those duties by the night yard-master. From that hour until the next morning he was free from his service for this company. While he was thus at liberty, and without notice to, and without the knowledge of, his superiors in the service of the company, he operated this train, not to earn fares for the company, for none were charged or collected, but to furnish himself and his fellow-servants a free ride to and from the depot where they held a meeting of their own. These undisputed facts exempt this company from all liability for any of the acts done or contracts made in the course of the operation of this train. They were not the acts or contracts of the company. They

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act of yard-
master—
Liability of
company.

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were the acts and contracts of the individual who performed and made them, and his only, and he alone can be held for the injury they caused.

Nor can the company be charged with these acts on the ground that it has ratified and adopted them because it paid the engineer or the fireman for three hours extra time for running this train. This payment is disputed, and the evidence regarding

**Payment of
engineer and
fireman for
extra time.**

it is conflicting; but we assume, as we must for the purposes of this case, that the payment was made. The testimony is, however, undisputed that, if this payment was ever made, it was allowed by direction of the master mechanic at the shops, an employé who never had any authority to direct or permit the operation of passenger-trains or coaches, or to make, adopt, or ratify contracts to carry passengers. His action allowing a claim of an employé for payment for extra hours' service could not make the company a party to the contracts of a third person that he had no authority to make on its behalf.

Finally, it is said that inasmuch as the presumption that the deceased was a passenger of the company arose from the facts that the yard-master was in possession of the train, operating it on the track of the company, and the deceased was riding therein, there was some evidence for the jury in support of the claim of the defendant in error, and the case was properly submitted to them by the court. But this argument loses sight of the fact that it is only where there is a dispute regarding material facts or a reasonable doubt as to the inference that must be drawn from undisputed facts that the court is required to submit an issue to the jury. All the material facts in this case are proved without contradiction or dispute. The inference that must be drawn from them under the law is not doubtful. A presumption of fact, like that which the counsel for the defendant in error here invoke, is a mere inference from certain evidence, and, as the evidence changes, the presumption necessarily varies. A trial court is not bound to disregard a conclusive presumption which arises from all the evidence at the close of a case because at some time in the course of a trial counter presumptions arose.

Possession of real estate raises a presumption of title; but, when a legal title is proved in another, a conclusive presumption arises from all the evidence that the latter is the owner, and the court must so direct. Possession of a horse raises the

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presumption of ownership, but the uncontradicted evidence of competent witnesses that the horse is the property of another, and that the possessor secretly took him from his owner without right raises so conclusive a presumption of ownership in the latter that the court might be bound to disregard the first presumption from possession, and the possession itself might raise a presumption of larceny. So in the case at the bar, when the uncontradicted evidence established the facts that the yard-master in charge of this train had no authority to carry passengers or to operate passenger trains for this company when he was on duty; that the train on which the deceased was injured was operated by him when he was at liberty from the service of the company, not in the discharge of any duty to it, but for the convenience of himself and his fellow-servants, without the knowledge of and without notice to those officers of the company who alone had the right to permit this train to be moved on the railroad at all, and that he obtained the passenger coach himself without the knowledge of any of these officers,—the conclusive presumption arose from all this evidence that his acts and contracts in this regard were not binding upon the company, and that those who rode upon that train were neither its passengers nor its licensees. *Daly v. Railway Co.*, 43 Minn. 319; *Karsen v. Railway Co.*, 29 Minn. 12.

The court below should have instructed the jury to return a verdict for the company, and the *judgment below must be reversed, and the case remanded*, with directions to grant a new trial.

It is so ordered.

BLEVINS (George W.)

v.

ATCHISON, TOPEKA & SANTA FÉ R. CO.

(*Supreme Court of Oklahoma, July 27, 1895.*)

Injury to Passenger Alighting from Moving Train—Liability of Company for Act of Employe not in Actual Employment—Contributory Negligence.—If one ships cars of cattle on a railroad stock train upon a contract which provides that he shall be transported upon the caboose attached to such train, and that he shall care for said cattle during transportation, and

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upon their delivery at their destination ; and he takes passage upon the caboose of such train, goes to sleep upon it, and is awakened by an employé of the railroad company, who is himself a passenger upon the train, and has nothing to do with its running or management, who tells him that the train has reached its destination, and that his cars of stock are being "set out at the stock chute" ; and he is not told or notified to leave the train by any one of the company's servants having charge thereof, and the train has in fact reached the point of destination, between 9 and 10 o'clock at night, the night being very dark, but has stopped at a distance from the passenger station, and upon a bridge 25 or 30 feet in height ; and he goes out of the caboose, and, with no lights or depot in sight, and without endeavoring to ascertain the situation of the train, steps off the platform, and in doing so falls 25 or 30 feet to the ground, thereby suffering injuries,—he cannot recover damages from the company. Such a case does not disclose negligence on the part of the railroad company. The cause of the injuries to the plaintiff was his own negligence. (*Page 335.*)

General Verdict Inconsistent with Special Findings.—When a general verdict is rendered in behalf of the plaintiff, and findings of fact are made by the jury upon special interrogatories proposed to it, and the defendant files his motion for judgment in his favor, and against the plaintiff, upon the findings of fact contained in the answers to the special interrogatories proposed to it, the general verdict will be set aside when the special findings of fact are inconsistent with the general verdict, and exclude such a conclusion as would authorize a recovery for the plaintiff. When the special findings of fact are inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly. (*Page 338.*)

Necessity of Finding Freedom from Negligence to Justify General Verdict.—In order to justify the jury in finding a general verdict for the plaintiff in this case, it was necessary that they should have found that the plaintiff's injuries were caused wholly by the negligence of the defendant in error, and that he should not himself have contributed to them by any negligence on his own part. (*Page 339.*)

ERROR to Oklahoma county district court. *Affirmed.*

R. G. Hays, J. H. Woods, and J. W. Johnson, for plaintiff in error.

Asp, Shartell & Cottingham, for defendant in error.

MCATEE, J.—This is a suit brought by the plaintiff in error, plaintiff below, against the defendant in error, to recover damages on account of injuries claimed to have been suffered in consequence of the negligence of the defendant in error.

Case stated.

On the 26th day of March, 1892, the plaintiff filed his complaint in the district court of Oklahoma county against the defendant, alleging the incorporation of the defendant; that it was running a railroad train through Oklahoma City, in this territory; that on the 26th day of February, 1892, the plaintiff contracted with the defendant to

Complaint.

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convey two car-loads of cattle from its station of Purcell to Oklahoma City, for which the plaintiff had agreed to pay the defendant; that, as a part of this contract, the plaintiff was to have transportation for himself between said points; that the defendant railroad company agreed to transport the plaintiff from Purcell to Oklahoma City upon the caboose attached to the freight train in which the plaintiff's cars of stock were shipped, so that the plaintiff would be able to care for the stock during transportation between said points; that, under said contract, the plaintiff shipped his cars of stock on the defendant's road, and became a passenger thereon between said points; that when the said defendant's train, on which the plaintiff was a passenger, was nearing Oklahoma City, on the night of February 29, 1892, the plaintiff, being in the caboose attached to said train for the accommodation of passengers, the agents and employes of the defendant in charge of the train negligently stopped the train about half a mile south of Oklahoma City, and that the caboose on which the plaintiff was riding was stopped upon and directly over the bridge, which was about 25 or 30 feet in elevation above the ground; that the night was very dark, and that the conductor in charge of the train came to the plaintiff, while the car was stopped upon the bridge, and negligently informed him that the train had arrived at Oklahoma City, whereupon the plaintiff, relying upon the information imparted to him by the conductor, went upon the platform of the caboose in which he was riding, to alight from said train; that, owing to the extreme darkness of the night, the plaintiff was unable to see that the car was standing upon the bridge, but supposed the same to be standing at the station at Oklahoma City, and in attempting to alight from the car, and owing to the darkness, that everything looked black, plaintiff supposed that the car was the usual distance from the ground, and supposed that the blackness he perceived was coal cinders, and he stepped off the platform of the caboose, whereupon he fell to the ground, a distance of 25 or 30 feet from the car; that there were no lights on the platform or steps of the car at the time he attempted to alight.

Complaint
continued.

The plaintiff further alleged that he was without negligence on his part in attempting to so alight, and that his fall from the car was wholly occasioned by the carelessness and negligence of the agents and employes of the defendant in charge of the train, and that by

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reason of said fall the plaintiff was greatly and permanently injured and disabled.

In answer, the defendant averred that the train upon which the plaintiff was riding by virtue of the said contract was a freight train, and that the danger, as the plaintiff well knew, was more upon a freight train than upon a passenger train, and that the injury to the plaintiff was not caused by any negligence on the part of the defendant, or its agents and employés, and that the plaintiff was guilty of negligence on his part, which was the direct cause of the injury to the plaintiff complained of; that the plaintiff was guilty of negligence in this: that he took passage upon a freight train, and went to sleep upon said train, and that, the train having stopped, the plaintiff, without any notice from the agents of the defendant in charge of the train that the train had stopped at the station, and without asking any of the agents or servants of the defendant in charge of the train whether the train had stopped at the station, in the darkness of the night aroused himself from sleep, and, with a long "prod pole" in his hand, voluntarily went out of the caboose in which he was riding, and, without making any inquiry to ascertain whether said train had stopped, or whether it was standing on the bridge or embankment, voluntarily jumped from the train, while the train was standing on the bridge, and was thereby injured; that the plaintiff failed to use the pole which he had in his hands to ascertain whether the train was standing on the bridge or on the level ground; that such negligent conduct on the part of the plaintiff was the sole cause of the injury, if the plaintiff was injured at the time and place mentioned in his complaint.

To this answer the plaintiff replied by a general denial, and alleging that he was illiterate, and did not know the character of the contract he had signed. A trial was had upon these issues by a jury.

Special questions were submitted to the jury, and returned into court signed by the foreman, in behalf of the jury, as follows:

Special findings. "Q. 1. Did the plaintiff ship the stock from Gainesville, Texas. A. Yes.

"Q. 2. Is Purcell in the Indian Territory? A. Yes.

"Q. 3. Did the plaintiff sign the contract at Purcell, introduced in evidence? A. Yes.

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"Q. 4. Did the plaintiff ship the cattle to Oklahoma City?
A. Yes.

"Q. 5. Did the train stop south of the station at Oklahoma City, and south of the switches and side tracks at said station? A. Yes.

"Q. 6. Did the train stop where it did for the purpose of switching the plaintiff's cattle to the stock yards? A. Yes.

"Q. 7. Was the train on which the plaintiff was riding a freight train? A. Yes.

"Q. 8. Was the plaintiff asleep on the train between Norman and Oklahoma City? A. Yes.

"Q. 9. When did the plaintiff wake up from his sleep? A. After the train whistled for Oklahoma City.

"Q. 10. Who waked plaintiff up? A. Mr. Speed.

"Q. 11. Did the plaintiff get up and put on his overcoat immediately after he was awakened? A. Yes.

"Q. 12. Did the plaintiff then say to the witness, Speed, 'Where are we at?' A. No.

"Q. 13. Who told the plaintiff 'they are setting your cars out at the stock chute,' if any one? A. Mr. Speed.

"Q. 14. Did the conductor say anything to the plaintiff after he was awakened, and before he went out of the caboose? A. No.

"Q. 15. Who was the conductor of the train, in charge of the train? A. Hamrick.

"Q. 16. Who told the plaintiff to get off the caboose at the time he got off? A. No one.

"Q. 17. Did the plaintiff tell any one he was going to get off the caboose before he did get off? A. No.

"Q. 18. Was any one with the plaintiff when he got off the caboose? A. No.

"Q. 19. Did any one see the plaintiff get off the caboose? A. No.

"Q. 20. Did the conductor know that the caboose was standing on a bridge? A. No.

"Q. 21. If the plaintiff had remained in the car until the train got up to the station, would he have been injured? A. No.

"Q. 22. Did the plaintiff do anything when he was on the steps of the caboose to ascertain whether the train was standing on a bridge or on the ground? A. No.

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trary, having been told by Mr. Speed that the cars had stopped to switch his cattle, he must have been aware that the caboose was not at the depot, and that the train had stopped for the transfer of cars alone. The plaintiff told no employé, agent, or servant of the company that he was going to get off the caboose, nor did any one see him get off. The conductor did not know that the caboose was standing on the bridge. There were no lights, buildings, or platform at the place where the plaintiff got off to indicate a depot or any provision for alighting, or a safe place at which to alight. The plaintiff would not have been injured if he had remained in the train. Upon getting out of it, he did nothing to ascertain whether the train was standing on the bridge or on the ground, although he had a "prod-pole" in his hand, and could, by the exercise of slight care, have ascertained that the car was not upon solid ground.

It has been repeatedly held that, in order to entitle the plaintiff to recover, he must himself have been free from negligence. Was he in fact so? The night was exceedingly dark. The plaintiff went out of the caboose and upon the platform upon his own motion, and without notice from the servants or agents of the defendant, and without making any use of the means at his command to learn where the car was or what position it was in. The slightest use of his eyesight would have informed him that he was not at the depot. The use of the "prod-pole" in his hand would have informed him that he was not at a place where it was safe for him to alight.

The announcement to the plaintiff and passengers by the servants and agents of the company that they had arrived at the station would have justified the plaintiff in presuming that the place where the train was then stopping was a safe and proper place at which he might alight, but, in the absence of such notice, it is difficult to understand how negligence can be imputed to the defendant. If passengers, without exercising even slight care, walk off the railroad train at any point where the train may stop, in the exigencies of the traffic in which the railroad company is engaged, upon what principle can the railroad company be held liable in damages?

The negligence of the plaintiff himself, in such circumstances, is the cause of the injury. The stopping of a cattle train at a distance from the railroad depot, for the purpose of transferring and switching cars of cattle into stock-yards, is

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one of the ordinary incidents of traffic upon railways. It is a usage which the shipper of cattle upon a particular train must be aware of, and of which he must be required to take notice. Nor are railroad companies required at such times to give special notice to every passenger not to get off; and under such circumstances, if a passenger gets off in the darkness without notice, and at a point which he must know is away from the depot, he certainly does so at his own risk. It is the duty of the passengers to be watchful and guarded, and not to endeavor to alight without notice from agents or servants of the company in charge of the train. If they attempt to leave the train in the darkness of the night at a distance from the station, without notice, they must assume the liability of such loss as they may suffer in consequence thereof.

In this case the plaintiff did not exercise the ordinary care by which he could have avoided the injury, nor can we see that the defendant was guilty of any negligence. A large part of the freight traffic of railroad companies must necessarily be carried on at night. The character of this traffic, in which long trains are employed, requires that stoppages be made at unusual points. All these matters belong to the common usage and custom of railway traffic, and are matters of which notice must be taken by such persons as see fit to avail themselves of the passenger facilities which are afforded upon trains of that character. *Railroad Co. v. Becker*, 76 Ill. 31; *Frost v. Railroad*, 10 Allen, 92; *Mitchell v. Railway Co.*, 51 Mich. 236, 12 Am. & Eng. R. Cas. 163; *Davis v. Railroad Co.*, (Sup.) 19 N. Y. Supp. 516; *Nichols v. Railway Co.*, 90 Mich. 203, 52 Am. & Eng. R. Cas. 304; *Nagle v. Railroad Co.*, Beach, Contrib. Neg. § 161; *Smith v. Railroad Co.*, 88 Ala. 538.

Plaintiff cites in his argument chapter 17, art. 9, § 38, of the Statutes of Oklahoma, 1893, which provides that: "When fare is taken by any railroad corporation for transporting passengers on any mixed train of passenger and freight cars, * * * * the same care must be taken, and the same responsibility and duties are assumed by the corporation as for passengers on passenger cars." It is, however, contended by the defendant in error that this statute can have no force or effect when applied to interstate contracts, in the rules of law, regulating the rules of commerce, if it attempts to impose upon the carrier any additional burden to that which is imposed

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upon the carrier by the general rules of law. It is not necessary to determine this contention. The rule here announced is applicable upon railway trains. It simply requires that the plaintiff should not, by his own negligence, contribute to the cause of the injury.

It is contended by the plaintiff in error that the court erred in setting aside the general verdict and in entering up judgment upon the special findings of fact made by the jury. **General verdict inconsistent with special findings.** It is provided by the Code of Civil Procedure, (chapter 66, art. 34, § 754, of the Statutes of Oklahoma) that "the provisions of this Code do not apply to proceedings in action or suits pending, when it takes effect. They shall be conducted to final judgment or decree, in all respects, as if it had not been adopted; but the provisions of this Code shall apply after a judgment, order, or decree, heretofore or hereafter rendered to the proceedings to enforce, vacate, modify or reverse it." This action was begun March 26, 1892, and the section of the Code of Civil Procedure before recited went into force August, 1893. The proceedings in the cause, up to final judgment in the district court, were governed by the Code of Civil Procedure of 1890, and the construction placed upon them by the supreme court of the state of Indiana, from which state that Code was adopted.

The findings of fact were made by the jury that the plaintiff was told by Mr. Speed that "they are setting your cars out at the stock chute." The plaintiff was thus informed that the train was not at the depot. It was further stated by the jury that the train stopped where it did for the purpose of switching the plaintiff's cattle to the stock-yards at Oklahoma City, to which point the plaintiff had shipped them. It was further found that nothing was said to the plaintiff by the conductor in charge of the train, and that he was not told to get off the train by any one in charge of the train; that he got off the train of his own motion, and would not have been injured if he had remained on the train, and that he got off the train in the dark without making any effort to discover where he was.

It will thus appear that the defendant was not guilty of negligence in stopping the train where it did, but that the stoppage was in the discharge of its duty. We do not think the contention can be sustained that in getting off the train at his own motion, at a place other than the depot, in the dark, without lights, notice, or

Liability of company.

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inquiry, and with no attempt to find out where he was, the plaintiff exercised the care which a reasonable and careful man should have exercised, and may be required to exercise before claiming damages which result from the consequences of such an act. The plaintiff was not a cripple, and he had in his hand a "prod-pole," by which he was especially enabled at the time to ascertain the position of the train. His failure to make use of any means whatever to guard against accident shows the want of ordinary care. And yet the absence of such care on his part is that negligence on his part which precludes a recovery at law. The plaintiff was not entitled to recover if he was himself guilty of negligence.

In order to justify the jury in finding a general verdict for the plaintiff, it was necessary that they should have found the plaintiff's injuries were caused wholly by the negligence of the defendant in error, and that he should not himself have contributed to them by any negligence of his own. The finding of facts was thus inconsistent with the general verdict in favor of the plaintiff, and the defendant was entitled to judgment, notwithstanding the general verdict. *Jewett v. Meech*, 101 Ind. 289; *City of Indianapolis v. Cook*, 99 Ind. 10; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Howe v. Young*, 16 Ind. 312; *Gripton v. Thompson*, 32 Kan. 367.

Necessity of finding freedom from contributory negligence.

The judgment of the court below is affirmed.

CONWAY (Lottie)

v.

LEWISTON & AUBURN HORSE R. CO.

(*Supreme Judicial Court of Maine, March 15, 1895.*)

Injury to Passenger Alighting at Unsafe Place in Street—Liability of Company.—A street-railroad company, having no control over the street, is not an insurer of the safety of any place at which it stops a car for passengers to alight. If the company exercises proper care in its selection of a place, it is not in legal fault if the place proves to be in fact unsafe. (*Page 341.*)

EXCEPTIONS from Androscoggin county supreme judicial court.

Injuries to Passengers Conway v. L. & A. H. R. Co.

For injuries received in alighting from defendant's horse-car, plaintiff claimed that where she alighted, close by the car, was a ditch at the side of the road, and that the conductor helped her off at this point; that in the dark, knowing nothing about the ditch, and supposing it to be a safe place, she stepped down, and received the injury. *Judgment for plaintiff sustained.*

A. R. Savage and H. W. Oakes, for plaintiff.

F. W. Dana and W. F. Estey, for defendant.

EMERY, J.—The defendant company was operating a street railway through various streets in Lewiston. The plaintiff

Facts. was being transported along the street, as a passenger, on one of the company's open cars. Upon her signifying a desire to alight, the car was stopped to enable her to do so, though at some distance beyond the place where she gave the signal. It chanced that at the place where the car stopped the side of the street sloped away into a ditch, so that the step down from the car to the surface of the ground was longer than usual, or than she anticipated, and consequently she lost her balance, fell, and was injured. She claimed at the trial that the company was bound to stop the car at a place safe for alighting, and, this place proving to be unsafe, the company was responsible for her injury.

Thereupon, the presiding justice ruled and instructed the jury, in part, as follows: "I instruct you, as matter of law,

Instruction. that it is a duty incumbent upon the common carrier, it is a duty upon this defendant corporation, carrying passengers for hire, to give them a suitable place of ingress, or opportunity to enter upon the car, and to give them a place of safety for exit or egress from the car. It is a question of fact for you, from the evidence in this case, to decide whether or not, at the point where this car stopped, there was a suitable or safe place for this plaintiff to alight from that car.

"If it was not a safe place, under all the circumstances of the case, and an injury was received by her, and she herself was in the exercise of due care at that time and place, then she is entitled to recover."

The correctness of this statement of the law applicable to street railways is the question presented by the defendant's exceptions.

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Upon a careful reading of the language of the ruling, it will be seen that the question of care or negligence on the part of the defendant was entirely eliminated. No matter how great and painstaking the care and foresight of the defendant in this very matter of finding a safe place for alighting, the ruling rendered them of no avail. No matter how safe the place may have appeared, no matter that there was nothing to indicate to the most prudent and vigilant man a lack of safety, the ruling held the defendant in fault. The only question left to the jury was whether the place was in fact safe or unsafe. The jury were, in effect, told that if the place was in fact unsafe the plaintiff was entitled to recover, notwithstanding the most extreme care on the part of the defendant company.

Question
presented.

Whether the ruling is a correct statement of the law applicable to common carriers of passengers, which have the power of constructing, and exclusively controlling, places for passengers to alight, is not the question here. This defendant company, so far as the case shows, had no such power. It had, so far as appears, no control whatever over the ditches, or the streets outside, or even inside, its rails. It could not select the places in the streets where its tracks should be laid, or its cars run. It could not construct nor control any places at which passengers were to step on or off its cars. It had to locate its tracks and run its cars where the public authority directed. It had to leave the centre, sides, and surface of the streets to the same authority. Passengers entering or leaving the cars had to use the streets in the condition they were left by the authority in control of them. Such passengers were not in the care of the company till they got on the car. They were no longer in its care when they stepped off the car. The company's care and duty began when its control began, and ceased when its control ceased.

Liability of
company for
injury to
passenger
alighting at
unsafe place
in street.

In the absence of any authority given the street-railway company over the streets, it must be evident that it cannot be held as an insurer of their safety for passengers to alight upon.

It is urged, however, that the ruling does not require a street-railway company to provide a safe place, but only to find a safe place, on the street, before inviting passengers to alight. But, with this interpretation, the ruling still throws

**Injuries to
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out the element of possible great and anxious care on the part of the company. If, after the highest degree of care in the selection, the place stopped at proves unsafe in fact, however safe in appearance, the company is allowed no defense. The surface may appear hard, flat, and smooth, and the best possible place for alighting; and yet a hidden defect, not known to nor ascertainable by the company after careful inspection, may cause an injury to the alighting passenger. The fault, if any, in such case, would be in fact upon the party charged with the duty of keeping the street in repair; but the ruling would place it on a party having no such duty, nor any control over the street. We think the ruling is erroneous, with whatever interpretation it is fairly susceptible of. *Railroad v. Wakefield*, 103 Mass. 261; *Creamer v. Railway Co.*, 156 Mass. 320.

In the case of *Railway Co. v. Scott*, 86 Va. 902, 44 Am. & Eng. R. Cas. 418, and in the other cases cited by the plaintiff, in which the street-railway company was held liable, it will be found that the question of the care or negligence of the company was not eliminated; hence they are not authorities in support of this ruling.

Exceptions sustained.

PATTERSON (George)

v.

AUGUSTA & SAVANNAH R. CO.

(94 Ga. 140.)

Nature of Action for Injury to Passenger—Limitation of Action.—Where the action against a common carrier is upon the contract to safely carry, although the breach alleged resulted in injuries to the person, for which damages are sought to be recovered, the action is one *ex contractu*, and is not barred until four years after the breach, notwithstanding the statute applicable to actions *ex delicto* bars actions for injuries to the person unless the suit be brought within two years after the right of action accrues. (Page 343.)

ERROR from Richmond city court. *Reversed.*

Colley & Sims and *J. R. Lamar*, for plaintiff in error.

Lawton & Cunningham and *J. C. C. Black*, for defendant in error.

Och v. M. K. & T. R. Co. Injuries to Passengers

SIMMONS, J.—Patterson brought his action against the Augusta & Savannah Railroad Company, alleging that he had made a contract with it, whereby it agreed for a certain consideration to transport him safely from the city of Augusta to the city of Waynesboro, on the line of its railroad, and that there was a breach of the contract, in that it did not transport him safely, but that he was injured and damaged by the loss of his arm. Case stated.

Where a person makes a contract of this kind with a common carrier, and he is injured by the negligence of the carrier, he has two remedies,—one an action for the breach of contract, the other an action on the case for the wrong,—and he may elect which remedy he will pursue. If he elects to bring an action for the breach of contract, he has, under the Code, four years within which to bring it; if he elects to sue upon the *tort*, he has two years. Code, §§ 2923, 3060. If he sues upon the breach of contract, and there is a final adjudication of this suit upon the merits, he cannot afterwards sue the same defendant on the *tort*. Nature of action—Limitation.

The plaintiff in this case having brought his action for a breach of the contract, and four years not having elapsed before the filing of the suit, he was in time; and, if he proves the contract alleged with this particular defendant, or one of its agents, who was authorized to make it, and the alleged breach and injury resulting therefrom, we see no reason why he cannot recover. See Code, § 2955; Hutch. Car. § 790.

Judgment reversed.

OCH (Julia K. and William J.)

v.

MISSOURI, KANSAS & TEXAS R. CO.

(*Supreme Court of Missouri, July 2, 1895.*)

Action for Personal Injuries for which Release from Liability has been Given—Sufficiency of Petition—Tender of Consideration for Settlement—Allegations to Avoid Release.—In an action by a passenger against a railroad company for personal injuries, for which a settlement has been made and a release given to the company, unless plaintiff allege in the petition that the execution of the release was fraudulently procured, there should be a return of, or an offer to return the money received in

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settlement, and the petition should contain a count in equity to set the settlement aside, on the ground of fraud, or it should be amended before or at the trial by adding such a count, and if neither course is taken there is no cause of action. (*Page 350, 355.*)

Same—Proof of Injury—Burden on Company to Show Freedom from Negligence.—Where plaintiff shows that she was injured by the fall of a ventilating window in the coach in which she was riding, it devolves upon the company to show by a preponderance of evidence that the injury was caused by something not under its control, and not from any fault, want of care, or watchfulness on its part. (*Page 359.*)

Same—Instructions—Submission of Question of Want of Mental Capacity to Execute Release, in Absence of Evidence Respecting Same.—In the absence of evidence as to a want of sufficient mental capacity to execute the release, the trial court erred in submitting the question of want of capacity to the jury. (*Page 353.*)

Same—Same—Permitting Recovery for Injuries Settled for.—Where it appeared by the evidence of the injured passenger that the company had settled with and paid her for all damages for injury developed to the time of settlement and release, it was error to instruct the jury that they might compensate plaintiff for all pain and suffering induced and resulting from the injury complained of. (*Page 360.*)

BARCLAY, J., and BRACE, J., *dissenting in part.*

IN BANC. Appeal from St. Louis circuit court. *Reversed.*

Jackson & Montgomery, for appellant.

Lee & Ellis, for respondents.

BURGESS, J.—This is an action for damages for personal injuries sustained by the plaintiff Julia while a passenger on one of defendant's trains, en route from Gainesville, Tex., to

Case stated. St. Louis, Mo. The plaintiff William Och is her husband. The suit was brought in the circuit court of the city of St. Louis. A trial before a jury resulted in a verdict and judgment for plaintiff in the sum of \$7521.45, from which defendant appealed.

Petition. The petition alleges that on the 7th day of October, 1891, plaintiff Julia was a passenger on defendant's cars from Gainesville, Tex., to the city of Sedalia, Mo.; and while at a station called Green Ridge, before reaching

and near to Sedalia, defendant's porter in charge of the car on which she was a passenger "did negligently and carelessly pull out of its place a ventilating window in the roof of said car, which, through the negligence and carelessness of defendant, was insecurely affixed to its place, and was unsafe and defective in condition and construction, down onto the head and face of plaintiff, cutting and bruising her head

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and face, and knocking her senseless; that she remained unconscious for considerable time; that the falling of said ventilator onto the plaintiff's head was without fault of the said plaintiff, and was caused by the negligence of the said porter in forcibly and carelessly jerking the ventilator out of its fastenings, and also by the insecure and dangerous manner in which the same was then fastened in the roof of said car, as well as by the defective character and condition of the same at the time it fell, which insecure and dangerous manner and defective character and condition the defendant at and before the said date knew, or, by the exercise of the care due toward its passengers, should and would have known."

The petition further alleges that, at the time of the injury, the plaintiff Mrs. Och was pregnant, and that, from the nervous shock caused by the blow on her head, she suffered a miscarriage; that she was for many days confined to her bed, and was finally compelled to submit to a painful and dangerous surgical operation, in having one of her ovaries removed; that she is permanently disabled and crippled for life. The damages were laid at \$25,000.

Defendant, in its answer, "admits that it is a corporation and a common carrier of passengers, and that on the 7th day of October, 1891, plaintiff Julia was a passenger upon one of its trains, but denies all other allegations in plaintiffs' petition."

Answer.

The answer then, as a special defense, "alleges that after said accident occurred, and on the same day, plaintiff Julia claimed that she had been injured by a small ventilator falling upon her head, and that she had a demand against defendant on account of said injuries; that it fully compromised, adjusted, and settled said claim and demand, and, for a valuable consideration paid by defendant to said Julia, she did then and there fully release and discharge defendant from all claims, of whatever kind or character, that she might have on account of or arising from said alleged accident and injuries and pleads said settlement and release in bar to plaintiffs' action."

To defendant's answer plaintiffs made reply as follows: "Now come the plaintiffs in the above entitled cause, and, for their reply to the new matter set up in defendant's amended answer herein, deny that on the

Reply.

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7th day of October, 1891, or at any other time, the plaintiff Julia K. Och compromised, adjusted, or settled the claim and demand set out in her petition herein, and deny that she released and discharged the defendant from any and all claims, of whatsoever kind and character, that might arise out of the injuries of the plaintiff complained of in her petition.

And, further replying herein, the plaintiffs aver that the employes and agents of defendant, including its physicians, surgeons, hospital nurses, claim agents, and conductors, fraudulently conspired together to unfairly and unlawfully obtain from the plaintiff a written release of her cause of action in this suit; that, in pursuance of such plan and conspiracy, said agents, within an hour after she received the injuries complained of, and while she was in a feeble, bewildered, and partially unconscious condition, took plaintiff to a railroad hospital in Sedalia, where the railroad surgeons and physicians, at the instance of defendant, examined her injuries, and pronounced them trifling and of no importance, and assuring plaintiff that she was not seriously injured, and that she would suffer no inconvenience from her wounds; that thereupon the claim agent for the defendant company prepared a written receipt and release of her claim in the petition herein set out, and tried to induce plaintiff to sign it, on payment to her of twenty dollars; that said plaintiff told said agent that she would not sign any release of her claim in this suit; that thereupon defendant's agent stated to her that he would change said writing so it would not be a release of any damages resulting from said injury, and he then and there professed and pretended to so change the same, and to strike out therefrom the release aforesaid, but, as plaintiffs have been informed since the institution of this suit, and as they now aver, the said agent did not cancel or strike out or change said writing so as to exclude therefrom the release aforesaid, but at the time said agent assured plaintiff Julia K. Och that said change had been made; that, at the time said plaintiff was sick in mind and body, and was, from her mental condition, unable to carefully read and understand said writing, and, believing in and relying upon the representations so made by said agent, she did receive said money, and signed said receipt and release so fraudu-

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lently and wrongfully obtained from her; that said plaintiff only signed said receipt on the faith of said representations, and except for that would have persisted in her refusal to sign the same, but that, relying upon said representations, she was fraudulently induced to execute the same.

Wherefore plaintiffs say that her signature to said writing was fraudulently and wrongfully obtained, and therefore not lawfully executed by her. Wherefore plaintiffs ask the court to declare said instrument null and void, and for judgment as in the petition asked."

After the jury was impaneled, and before any evidence was introduced, defendant's counsel objected to the trial of the case by a jury, on the ground that the pleadings present a question which should be tried by the court sitting as a court of equity, before the other branch of the case should be submitted to the jury.

Objection to
trial by jury.

The objection was overruled, and defendant duly excepted.

The material facts, as disclosed by the evidence, were as follows: The plaintiff was 26 years old, had been married 8 years, and had a son 7 years old, but had never had any other children. On October 6, 1891, she left Gainesville, Tex., for St. Louis, by way of the Missouri, Kansas & Texas Railway to Sedalia, thence by the Missouri Pacific to St. Louis. She rode in a chair car, and on the morning of October 7th, when south of Green Ridge (a station about 12 miles from Sedalia), the colored porter commenced to open the ventilators, which are placed in the elevation between the lower and upper decks of the car. He passed along, opening them with a stick with a hook on the end of it, taking them in order; and, when he touched the one over plaintiff, it fell, and struck her on the head, breaking one of the small pieces of glass in it, and making an incision in her scalp about an inch or more back from the edge of the hair, and also bruising her lip.

Facts.

She testified that she was not conscious of the window falling on her head, and, when she came to, there was a physician with her, and all the ladies around her. She saw glass and blood on the floor, and her head was being bathed, and the physician was picking glass out of her head. When they got to Sedalia, the physician took her out of the car, and put her and her little boy in a carriage, and took them to the

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railroad hospital. She was not acquainted with any one in Sedalia. She testified that, when she got to the hospital, she was taken to a room where there were eight or ten doctors; they examined her head, bathed it, and dressed it, applied some medicine, dressed the wound on her lip, gave her some arnica, and told her to apply it, and assured her that she was not seriously hurt, and that it did not amount to anything; that she was stunned and in a dazed condition, and hardly knew what was going on; that she and her little boy were then taken to breakfast, but that she could not eat anything; that she was then taken to the room that she went from into the dining-room, and there the doctors surrounded her, and assured her that she was not seriously hurt, and said they did not think that she would ever hear from it again.

With respect of the execution of the release by Mrs. Och, she testified, that she was introduced by the doctors to the claim agent of defendant whose name is Hollister; that, when introduced to him, he came forward, and told her that he wanted to pay her for the inconvenience she had been put to, and little suffering, and asked her if she would accept \$20 if she should need any medical attention on the way or after she got home; that he then handed her a receipt, and said to her, if she would sign it, he would pay her \$20; that she tried to read it over, and saw something in there about a release, releasing the company always for all time; that she thought then she could hardly do it, that something might come up; she was stunned and dazed, yet she thought the blow on the head might produce other things; that she did not fully realize what was going on, and she told the claim agent that she could not sign it under the circumstances; that he then took the papers, and said he would fix that up to date,—fix it so it would read only up to date; the payment up to date; that she did not know that he used the words, but that is the way she understood it, that \$20 was for payment up to date; if anything further should occur to notify them, and they would be responsible; that he said that to her; that he had a pencil, and made some erasures on the paper; that the paper does not read as she thought it did; that her nervous condition was very much upset and bewildered, and she did not remember the paper as it is, signature and all; that the signature is somewhat in her handwriting

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Her attention was then called to the following language in the release, to wit: "I do hereby fully and forever release and discharge said company from any and all claims, of whatever kind and character, I may have on account of or arising from said accident or injuries, in consideration of the sum of twenty dollars,"—and was asked if she remembered that language in the instrument which she saw and signed, to which she replied: "Something to that effect, and it was that that she objected to." She further stated that when she gave the paper to him, and saw him make an erasure, she understood that he was erasing that part where it read that she did release the company; that she understood that he was erasing the words, "And I do hereby fully and forever release and discharge said company from any and all claims, of whatever kind and character;" that he told her that he would scratch that out,—“fix that,” she thought, were the words he used,—and, watching him, she supposed he had erased that part; that he had a pen or pencil with which to make the erasure, and that she saw him make an erasure or mark, and fully believed that he had made them; that he then handed her the paper to sign, and she signed it; that, after she saw him make the erasure, she did not read it again before she signed it; that he went right out after she signed the paper, and took it with him; that she did not read the paper over again after he took it, and made, as she thought, the erasure, because she relied fully on his word; that he then paid her the \$20; that she was feeling very poorly at the time, and had not recovered from the blow on the head; that she was stunned, and did not realize all,—that is, all that was going on; that, after she had signed the paper, the doctors came in again, and assured her that she was all right, and that she could proceed on her journey; that she was then taken to the train by one of the physicians, who put her aboard of the car; that she then met a gentleman who seemed to know all about the accident, and an old lady, and that she asked plaintiff how she was feeling; that she was then feeling very much dazed; the pain was coming on.

On cross-examination, she stated that, when she got to the hospital, the doctors washed and bathed her head, and dressed the wound; that they applied some medicine and cotton, and she thought a bandage, but was not certain;

Facts continued.

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that one wound was on top of her head, about in the centre, just back in the hair, an inch or inch and a half, and the other was on her lip, just a gash across her lip, on the outside, not clear through; that the lady she met on the cars was Mrs. Beanland, and the gentleman a Mr. English, whose names and addresses she got before leaving Sedalia, and after having taken the Missouri Pacific train; that, in doing this, she acted upon the advice of Mr. English, who suggested she might be seriously ill; that she signed the paper relying upon the word of the claim agent that the part she objected to had been erased, and accepted the \$20, which she has never returned.

The claim agent, Hollister, in his testimony, denied all the material statements made by Mrs. Och.

There was further testimony tending to show that Mrs. Och was pregnant at the time of the injury; that she had a miscarriage in consequence thereof; suffered great pain; had to submit to a painful surgical operation in having one of her ovaries removed; and that her health is permanently impaired.

The testimony of physicians introduced as witnesses on the part of defendant tended to show that the diseased ovary might be attributable to other causes than that of pregnancy and miscarriage, and one of them testified that he thought she was not pregnant at the time of the injury, but was suffering from delayed menstruation.

Defendant's first contention is that the release pleaded in the answer was a bar to the cause of action stated in the petition until rescinded, and that it was error to try the

Avoidance of release. issue of fraud as raised in the reply to defendant's answer jointly with the other issue in the case

before a jury; that the issue of the fraud or good faith in obtaining the settlement and release should have been tried separately, as a proceeding in equity.

Upon the other hand, it is argued that, if rescission was necessary, the release could be rescinded in an action at law, and the issue made by the answer and reply was triable by jury.

Girard v. Wheel Co., 123 Mo. 358, is relied upon by plaintiff as being in support of her contention. It is true that it was held in that case that a reply to a release alleging that it was obtained by fraud might be tried in an action at law,

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without resorting to equity to cancel such a document. The same rule has been announced by a number of courts of high standing. This may be conceded to be the law in case the party was wholly incompetent to contract, or the execution of the release was obtained by fraud; that is, where the person executing it was induced to believe that he was signing one kind of an instrument when in fact he was executing an instrument of a different character. In that case the plaintiff testified that he had no recollection of signing the release, and at the time was unable to read or comprehend anything.

In *Hartshorn v. Day*, 19 How. 211, it was said: "Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring the signature and seal."

The case of *Wright v. McPike*, 70 Mo. 175, was of this character. *Mullen v. Railroad Co.*, 127 Mass. 86; *O'Donnell v. Clinton*, 145 Mass. 461; *Smith v. Holyoke*, 112 Mass. 517; *Rosenberg v. Doe*, 148 Mass. 560; *O'Neil v. Iron Co.*, 63 Mich. 690; *Ryan v. Gross*, 68 Md. 377; *Kirchner v. Machine Co.*, 135 N. Y. 182.

So, where no consideration has passed for the release, that defense may be made in an action at law. *Brewster v. Brewster*, 38 N. J. L. 119. Or, when a person sustains personal injuries, and at the same time damages to his personal property, and his release and receipt of a moneyed consideration for injuries to his property and person are found, as to the latter, to have been obtained by fraud and without consideration, upon the belief that he was simply settling and receipting for injury to his property, in an action for damages for the personal injuries it is no obstacle to his recovery that he has not returned the money received by him in settlement for the damages to his property. *Bliss v. Railroad Co.*, 160 Mass. 447; *Lusted v. Railway Co.*, 71 Wis. 391. In the latter class of cases the release does not go to the cause of action in suit.

Now, if Mrs. Och was induced, by fraud practiced upon her by the agent or servants of the defendant company, to execute the release, by which she, in consideration of the sum of \$20 then paid, released said company from all claims and demands against it for the personal injuries received by her sued for in this

Fraud in procuring release.

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action, when in truth and in fact she believed the release to be in full only if she should experience no further trouble from her injuries after that time, but if she did, then the railroad company would be responsible, and the injuries sued for developed after the execution of said release, the return of the money was not a prerequisite to her recovery in this action.

In such case "the only evidence of fraud that can be received is that in relation to the execution of the instrument, as that the party was illiterate, and the deed was misread to him, or that another deed from that intended to be executed was substituted." *Burrows v. Alter*, 7 Mo. 424.

In *George v. Tait*, 102 U. S. 564, it was said: "Proof of fraudulent representations by Meyers & Green, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected. It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or by obtaining by some other trick or device an instrument which the party did not intend to give. * * * The remedy is by direct proceeding to avoid the instrument." The doctrine of this case was followed and approved in *Vandervelde v. Railroad Co*, 61 Fed. Rep. 54.

Mrs. Och knew that she was signing a release for any claim for damages that she then had against the defendant company for injuries then apparent. She testified that, owing to her injuries and dazed condition, she was unable to read or understand all of it, but she saw something in it about a release from all damages, and told the agent she would not sign the release; that he then stated that he would fix it, and, in her presence made an erasure on the paper, giving her to understand that he was striking out the release clauses, leaving the paper simply a receipt for \$20, which was to be in full if she experienced no further trouble from her injuries before she signed it.

The authorities which hold that the execution of a contract obtained by fraud is void, although a valuable consideration may have been passed, are based upon the ground that the minds of the contracting parties never met, and that there is wanting that reciprocity of consideration essen

Facts showing
fraud in secur-
ing release.

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tial to a valid agreement. She is evidently a lady of unusual intelligence, as clearly shown by the objections which she first made to the release, and the precautions she took in obtaining the names and addresses of persons on the train at the time of the accident, in order that she might procure their testimony in the event that she might need it thereafter. She signed her own name to the paper, and the burden rested upon her to show that its execution was obtained from her by fraud and deceit. There was nothing on the face of the release calculated to mislead or deceive. It plainly showed upon its face that it was not merely a receipt, and the presumption is that she had knowledge of its contents. Clearly, if there was no fraud practiced upon her, it was her own fault or negligence in failing to read it, if she did not know its contents. *Snider v. Express Co.*, 63 Mo. 376; *Mateer v. Railway Co.*, 105 Mo. 320; *Wallace v. Railway Co.*, 67 Iowa 547; *Railroad Co. v. Shay*, 82 Ga. St. 198; *Plenn v. Statler*, 42 Iowa 107.

As there was no evidence tending to show want of sufficient mental capacity on the part of Mrs. Och to execute the release, that question should not have been submitted to the jury, and in this respect the third instruction given at her instance is erroneous.

That instruction reads as follows: “(3) If you find from the evidence that, when the plaintiff Mrs. Och signed the release given in evidence by the defendant, she was not in a physical or mental condition to fully and fairly examine and understand the meaning and effect of that instrument as a release of the damages demanded in this suit; or if you find that the claim agent of the defendant company represented to her that he would erase the release clause in said paper, and that he then falsely pretended to make such change or erasure, but in fact did not make it; and if you further find that the plaintiff Mrs. Och did not intend to release her claim for the damages herein sued for, but that she relied upon the said statement of the claim agent and his said pretended erasure, and that she was thereby induced to sign the paper without further examination, or that she was physically or mentally unable to fairly make such examination at the time,—then, and in either of said events, the court charges you that said release is no bar to plaintiff’s claim in this suit.”

Instruction as
to want of
mental
capacity.

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The release in question is not a mere receipt, but contains all the essentials of a valid contract, and, unless its execution was obtained by fraud or deception, is a bar to the present action, until set aside in a direct proceeding in equity for that purpose, in which event the money received in consideration therefor must be refunded or tendered back at the time of the institution of the proceedings for its cancellation. If, then, the contract of release was obtained by the fraudulent statements and representations of the physicians of defendant as to the extent of plaintiff's injuries by which she was induced to execute it, and accept the money in consideration therefor, then the contract was voidable at her will; but that it was absolutely void is a proposition to which we are unable to give our assent. A void contract may be disregarded by either party; a voidable contract cannot be.

Necessity of
setting release
aside.

It will scarcely be contended that defendant company could have maintained an action against the plaintiff for the money paid on the contract of settlement under these circumstances. No executed contract, where a valuable consideration has passed, made between parties competent to contract, not immoral or prohibited by statute, nor against public policy, is void between the parties thereto, however fraudulently it may have been obtained. And, if the release in this case is to be canceled, the parties should be put in *statu quo*. *Railway Co. v. Hayes*, 83 Ga. 558; *Insurance Co. v. Howard*, 111 Ind. 544, 13 N. E. 103; *Gould v. Bank*, 86 N. Y. 75, *McMichael v. Kilmer*, 76 N. Y. 36; *Bruce v. Davenport*, 1 Abb. Dec. 233; *Ryan v. Ward*, 48 N. Y. 204; *Coon v. Knap*, 8 N. Y. 402; *Cleary v. Electric Light Co.*, 19 N. Y. Supp. 951.

Rescission of
fraudulent
contracts.

In the case last cited, it was said: "The rule undoubtedly is that, where a party seeks to rescind the contract on the ground of fraud or imposition, he must tender a return of what he has received under it before he can maintain an action at law; and, in action in equity, he must at least tender a return by his bill of complaint." As long ago as 1823, it was held by this court that a New Madrid certificate obtained through fraud or mistake, and without consideration, was not void, but voidable, and good against the United States until annulled or set aside. *Stuart v. Rector*,

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1 Mo. 361. This case was followed and approved in Mitchell v. Parker, 25 Mo. 31. See, also, Kearney v. Vaughan, 50 Mo. 284.

The law as thus announced is, we think, applicable to the case at bar on this theory of the case. If the money received by Mrs. Och was in consideration of a settlement for all injuries which might result to her in consequence of the accident, the retention of it after it became known to her that the release was obtained through fraudulent representations, and after she had decided to sue therefor, and to ignore said settlement, was as inconsistent with justice and fair dealing as was the conduct of defendant's agents in obtaining from her a release through fraud and deceit, if such was the case.

We are indebted to MACFARLANE, J., for views expressed in an unpublished opinion in the Girard case, *supra*, with respect to the subject now under consideration, in the following language: "It is undoubtedly true, as Same—Cases examined. a general rule, that one who, having been induced by fraud to enter into a contract, afterwards exercises the right to rescind it, must restore the other party to the same condition he would have occupied had the contract never been made. Defendant claims that plaintiff's right to rescind the release in question falls within this rule, and we can see no sufficient reason why it should not. A distinction cannot be fairly drawn between a release of liability for personal damages or other tort and that of a liability resting on contract."

It was held by this court in Estes v. Reynolds, 75 Mo. 565, that "a party cannot affirm a contract in part and repudiate it in part. He cannot accept its benefits, on the one hand, while he shirks its disadvantages, on the other." The justice of this rule commends itself to every reasonable mind and every conscience; it matters not whether the fraudulent contract or transaction is brought in question by legal or equitable proceedings. The rule is declared by all text-books, and is followed as a general rule by all the courts. The law will not permit plaintiff to retain the fruits of the settlement, and at the same time ignore it as if obtained by fraud. It will not permit her to retain the money she received under the contract of settlement if in satisfaction of

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her entire claim, and yet proceed in disaffirmance thereof. Kerr, Fraud & M. § 52; Chit. Cont. 276; 1 Beach, Eq. § 76; Bigelow, Frauds, §§ 74, 75; Thayer v. Turner, 8 Metc. (Mass.) 550; Evans v. Gale, 17 N. H. 573; Doane v. Lockwood, 115 Ill. 490, 21 Am. & Eng. Enc. Law, 84; 2 Pom. Eq. Jur. § 910; 2 Pars. Cont. 679.

Until repudiation of the contract of settlement, plaintiff has no cause of action. Under such conditions, something must then be done by the party defrauded before the contract can cease to be binding, * * * so that it is specific performance reversed,—the literal undoing * * * of the contract.” 1 Bigelow, Frauds, 74. See, also, Chit. Cont. (11 Am. Ed.) 1089, note on 1092; Ackerman v. McShane, 43 La. Ann. 507; Kinne v. Webb, 49 Fed. 512. “And, if a party defrauded would exercise the right to rescind, he must do so promptly on discovery of the fraud.” SHERWOOD, J., in Clough v. Holden, 115 Mo. 359. See, also, Masson v. Bovet, 1 Denio 69; Selway v. Fogg, 5 M. & W. 83; Railroad Co. v. Row, 24 Wend. 74; Hart v. Handlen, 43 Mo. 171.

In Jarrett v. Morton, 44 Mo. 276, plaintiff and defendant had settled a disputed claim. Defendant, although denying that he owed plaintiff anything, in order to avoid a controversy at the solicitation of plaintiff, “squared off” by giving him a note which he held on another party, and upon which plaintiff was surety. Plaintiff put the note in his pocket, without looking at it, but afterwards found out that it was for less than he supposed it was; yet he collected the amount due, and thereafter sued defendant on the original demand, without ever offering to return the note to him. The court said: “But the plaintiff finds the note less than he expected, and complains that he is deceived. And what does he do? Does he at once, upon discovery of the deception, look up the defendant, and repudiate the settlement? Not at all. But he holds on to the price of the settlement, collects the note, pockets its proceeds, and still treats the claim as never having been adjusted. This the law will never permit. If the plaintiff would repudiate the settlement, he must put the other party in the same condition he was before it was made. He cannot appropriate its benefits and deny its obligation. There never was but one doctrine upon this subject; and the books are full of decisions that, if the

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party would rescind a contract for fraud or other cause, he must, as far as in his power, put the other party in the condition he would have been in had the contract not been made. Before commencing proceedings on his original claim, the plaintiff should have tendered back the note received of defendant, — should have repudiated the settlement, — and then he would have been at liberty to impeach it if set up against his claim. But, as it is, he hangs onto it, and is not at liberty to deny its validity.” Settlements and releases apply alike to all kinds of claims, whether arising from contract or tort. There can be no reason why it should not be so, and the authorities which hold to the contrary cannot be sustained on reason or authority.

As there was evidence tending to show that the money received by plaintiff was in full satisfaction of her claim against the defendant, unless the execution of the release was obtained by fraud, she should have returned, or offered to return, the same before or at the time of bringing her suit, and incorporated in her petition a count in equity to set aside the settlement on the ground of fraud, as was done in *Blair v. Railroad Co.*, 89 Mo. 383; *Allen v. Logan*, 96 Mo. 591; *Cleary v. Electric Light Co.*, *supra*; *Sudlow v. Mead*, 109 N. Y. 643; *Francis v. Railway Co.*, 108 N. Y. 93.

Avoidance of
release.

Or the petition might have been amended before or at the trial upon proper terms, by adding a count in equity to set aside the settlement. Until this was done she had no cause of action; for until the settlement is set aside, if in fact there was one, it stands as an insurmountable barrier to the prosecution of this action. Upon this branch of the case, while plaintiff, in her replication to defendant's answer, alleges that the release was obtained in part by the false and fraudulent representation of the physicians of defendant company, there was no evidence tending to show that she was in any manner misled thereby, and the judgment upon that question is *res judicata*.

As it logically follows from what has been said that the judgment must be reversed, only such questions will be adverted to as may necessarily arise on a retrial of the cause, should it be remanded.

It is insisted that, by the compromise, Mrs. Och, according to her own evidence, released the defendant from at least a

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part of her cause of action, and that, as it was indivisible, it could not be split up into separate parts, and, in consequence thereof, she could not maintain this suit.

There can be no question as to this proposition as a general rule. It was so held in *Moran v. Plankinton*, 64 Mo. 337; *Funk v. Funk*, 35 Mo. App. 246; *Green v. Von der Ahe*, 36 Mo. App. 394; *Mateer v. Railroad Co.*, 105 Mo. 320; *Hinkle v. Railroad Co.*, 31 Minn. 434. And the rule "is applicable to actions *ex delicto* as to those *ex contractu*." *Railroad Co. v. Traube*, 59 Mo. 355.

The *Mateer* case was an action for personal injuries, and the ruling of the court on the question now under consideration seems to have been predicated upon the fact that the plaintiff knew the full extent of his injuries at the time of the settlement, and therefore could not split up his cause of action, which "was one and entire." But in this case Mrs. Och, by express contract, as she claims, limited and confined her settlement and release to all injuries that were then perceptible, and eliminated therefrom any injuries that might subsequently follow as a necessary result of the accident. If her evidence is to be believed, she only settled for the injuries that were manifest at that time, and did not release her cause of action for subsequently accruing injuries and suffering, and her rights ought not to be prejudiced by reason of doing that which the defendant expressly contracted that she might do. Actions for personal injuries have been maintained in cases where, at the time of the injury, personal property was also damaged by the same agent, and a compromise and release for the damages to the property was effected before suit was instituted for the personal injuries. *Bliss v. Railroad Co.*, *supra*; *Lusted v. Railroad Co.*, *supra*. But we rest our conclusion on this question on the contract between the parties, if it was as claimed by Mrs. Och.

In passing upon a similar question in *Blair v. Railroad Co.*, *supra*, SHERWOOD, J., in speaking for the court, said: "The doctrine is firmly rooted in equity that when an instrument is so general in its terms as to release the rights of a party of which he was ignorant and which were not in contemplation of the bargain at the time it was made, the instrument will be restrained to the purpose of the bargain, and the release confined to the right intended to be released."

Plaintiff's instructions are criticised, because it is insisted that they required a greater degree of care of defendant with

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respect to the window that caused the injury than is warranted by law, and that defendant was only required to make use of such care as was commensurate with the nature and use of the ventilator, and the possibility of dangerous consequences of its use.

Proof of injury
—Burden on
company.

While carriers of passengers are not insurers of their safety, and are not responsible when all reasonable care, skill, and diligence, prudence, and foresight have been employed, the law imposes upon them the utmost care and skill in selecting and furnishing safe means of transportation, and to that end to provide safe coaches and appliances, necessary for that purpose, including every part and parcel thereof, which very prudent men would exercise under like circumstances; and, when the injury to the plaintiff was shown to have been occasioned by the falling upon her head of a ventilating window from the coach in which she was riding, then it devolved upon the defendant to show by a preponderance of the evidence that the injury was caused by something not under its control, and not from any fault, want of care, or watchfulness upon its part. The same degree of care was required of defendant as to all parts and all kinds of its property used in the transportation of its passengers as compared with its liability to cause injury to them. The same rule applies when the injury is caused by want of diligence or care by those employed by the carrier.

In *Meier v. Railroad Co.*, 64 Pa. St. 225, it was said: "*Prima facie*, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of disproving it. This is the rule when the injury is caused by a defect in the road, cars, machinery, or by want of diligence or care in those employed, or by any other thing which the company can and ought to control as a part of its duty to carry the passengers safely; but this rule of evidence is not conclusive."

The same rule was announced by this court in *Clark v. Railroad Co.*, 127 Mo. 197. So in *Dougherty v. Railroad Co.*, 81 Mo. 325, it was said: "That where the vehicle is shown to be under the control or management of the carrier or his servants, and the accident is such as, under an ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence,

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in the absence of explanation by the defendant, that the accident arose from want of care." It would seem from the authorities cited that the criticism of the instructions in placing the burden of proof upon defendant is not justified by the authorities.

Not do we think the court committed error in giving the fifth instruction asked by plaintiffs, in modifying and giving the fourth instruction asked by defendant, or in refusing to give other instructions asked by it.

Plaintiff's sixth instruction is criticised, in that it told the jury that in assessing her damages, in the event their verdict

Permitting recovery for injuries settled for. should be for her, at such sum as would "compensate her for any and all pains and suffering by her, induced and resulting from the injury complained of, including all bodily pain and mental anguish she may have suffered by reason of said injury, and if she had suffered any permanent injury or incapacity resulting from said injury, they should also consider this, and by their verdict make reasonable compensation therefor"; while, according to her own evidence, she admitted that defendant settled with and paid her for all damages for injury developed up to October 7, 1891; thus permitting her to recover for injuries for which she had already received satisfaction by way of a moneyed consideration, which she never returned or offered to return to defendant.

This instruction was manifestly erroneous, and prejudicial to defendant.

The judgment is reversed, and the cause remanded.

GANTT, MACFARLANE, and ROBINSON, JJ., concur. SHERWOOD, J., concurs in reversing, but thinks plaintiffs have no cause of action on the evidence. BRACE, C. J., and BARCLAY, J., express their views in a separate opinion.

BARCLAY, J. (*dissenting*).—We do not agree to all that is said and intimated in the opinion of our learned colleague, Judge BURGESS, and therefore state our views of the case.

Dissenting opinion. The action is for damages to plaintiff, a married woman, on account of injuries sustained by her while a passenger on defendant's train. She charges negligence, in that a transom in the upper part of a passenger car fell out, or was by the porter carelessly pulled

out, of its place, so that it struck plaintiff, and injured her. The woman's husband is joined as a plaintiff; but, as no claim for damages is asked on his account, we treat the case as though Mrs. Och were the sole plaintiff. The answer denies the negligence, and sets up as a bar an accord and satisfaction, or "release," as it is termed, of which a copy will appear later. The reply, in substance, states that the release was signed soon after plaintiff's injury; that she was then "sick in mind and body," unable to "carefully read and understand it"; and that she was induced to put her name to it by fraudulent representations of defendant's agent that it was not a full release, etc. The pleading charges that the signature was fraudulently obtained, and the court is asked to declare the instrument null and void.

When the case was called for trial, the following moves were made by counsel in the cause, as appears by the recital in the bill of exceptions, viz.: "Defendant's counsel object to the trial of the cause by a jury, on the ground that the pleadings present a question which should be tried by the court sitting as a court of equity, before the other branch of the case should be submitted to the jury. Plaintiff's counsel state that they do not ask for equitable relief from the court concerning the release, but rely on the facts set up, which should go to the jury. The court states that, under the statements made by plaintiff's counsel, it will overrule the motion to have the question tried by the court, which calls for the cancellation of the instrument. Defendant, by its counsel, at the time duly excepts."

The evidence tended to prove that, while plaintiff was sitting in a chair in defendant's car, she was hit by a transom which fell upon her while the porter of the car was attempting to move it with a stick held in his hand. The transom struck plaintiff on the head, and she was rendered unconscious by the blow, until just as the train was approaching Sedalia, when she revived.

One of the important phases of the case is as to the proper legal force of her evidence in regard to the receipt. We append the material parts of her statement in the trial court on that subject, in her own language:

On plaintiff's direct examination: "Q. Were you conscious of the window falling on your head? A. No, sir.

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Q. You became unconscious, you say? A. Yes, sir. Q.

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opinion con-
tinued.

When did you regain your senses, so as to be able to know anything that was going on? A. When I came to, there was a physician with me, and all the ladies around me. I saw the blood and glass on the floor. My head was being bathed with water and wet towels. Q. What was the physician doing with you or your wounds? A. He seemed to be attending to the wounds; bathing it, or picking the glass out. I do not remember. Q. Was there any blood on your face? A. Yes, sir; on my face and my clothes. Q. You saw the glass, did you? A. Yes, sir. Q. What was done, then, when the physician came? A. We were drawing into Sedalia. As soon as we got to Sedalia, he took me out. We crossed a few tracks, and took a carriage, and went to the hospital. Q. What conveyance did he put you in? A. A carriage. Q. Did anybody accompany you and him? A. Nobody but my little boy. Q. Did you have any acquaintances there at that time? A. No, sir. Q. Where did he have you driven? A. To the Missouri, Kansas and Texas hospital. Q. When you got to the hospital, about what time in the morning was that, if you remember? A. I could not tell. It was right shortly after the accident; somewhere between seven and nine. Q. And how long did you remain there, if you remember? A. I do not know, but the impression was on me that we were to stop at Sedalia two hours. After leaving the hospital, I think I was there an hour, which makes me think I was there an hour. Q. When you left the hospital, where did you go? A. Back to the depot. Q. How did you go? A. In a carriage. Q. Who put you in the carriage? A. The same doctor that took me there. Q. When you got to the hospital, tell us what was done. A. I was ushered into a room where there were eight or ten physicians, if I remember correctly. Q. Do you know the name of the physician who accompanied you in the carriage? A. No, sir. Q. How did you know he was a physician of the company? A. From his actions I supposed he was a physician, and they termed him 'Doctor.' Mr. Jackson: It was Dr. McNeill, of the force. By Mr. Ellis: He accompanied you to the hospital? A. Yes, sir. Q. You went into a room where there were eight or ten doctors. What happened there? A. They examined it, bathed it, and dressed it,

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applied some medicine, and dressed the wound on my lip. That was about all. They assured me that nothing more would come of it; that I was not seriously hurt; that it did not amount to anything. Q. Well, was there much conversation on your part there? A. No, sir. Q. How were you feeling? What was your condition at the time you got to the hospital? A. I was stunned. I didn't hardly know what was going on. I was in a stunned and dazed condition. Q. A stunned and dazed condition? A. Yes, sir. Q. Can you remember all that transpired there? A. I remember the doctors all consulting one with another, and agreeing that I was not seriously hurt; that it did not amount to anything; that I would be all right in a day or two. They handed me a phial of medicine, and told me to apply it. As well as I remember, it was something like arnica. Then I was taken into the breakfast-room, and breakfast served for myself and little boy. I was in no condition to eat anything. I think I sipped a little coffee. My little boy ate a hearty breakfast. I was taken back to the same room, and there the doctors surrounded me and assured me I was not seriously hurt, and did not think I would ever hear from it again. Q. Did not think you would hear from it again? A. Yes, sir; I think the conductor came in, and some man they called a 'claim agent.' Q. Who was present at the time the claim agent was there, if anybody? A. The doctors brought him in, and introduced him, and then left again, as I remember now. Q. Do you remember the name of the claim agent? A. No, sir. Q. Do you remember the names of the doctors, or any of them? A. No; I do not know that I heard them. Q. Do you think you would be able to recognize them again? A. Perhaps. Q. When they introduced the claim agent to you, what happened then? A. He came forward, and told me he wanted to pay me for the inconvenience I had been put to and little suffering, and asked me if I would accept \$20, if I should need any medical attention on the way or after I came home. Then he handed me a receipt, and said to me, if I would sign this, he would pay me \$20. As I remember now, I tried to read it over, and saw something in there about a release. Q. Release? A. Releasing the company always, for all time. I thought then I could hardly do it; that something might come up. I was stunned and dazed; yet I thought the blow on the

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head might produce other things. I did not fully realize what was going on, and I told the claim agent I could not sign it under those circumstances. Q. Then what transpired? A. Then he took the papers, and said he would fix that up to date. Q. Do what? A. Fix it so it would read only up to date. Q. What would be up to date? A. The payment up to date. I do not know that he used the words, but that is the way I understood. Q. If you do not remember the words, give the substance of it as well as you remember. A. \$20 was for payment up to date; if any thing further should occur, to notify them, and they would be responsible. Q. Did he say that to you? A. Yes, sir. Q. Well, now, when he took the papers, saying this to you, what did he do? A. He had a pencil, and made some erasure. Q. In what? A. On the paper. Q. Will you be good enough to look over the document on white paper, and read it to yourself? I want you to examine it [handing paper to witness]. A. The paper does not read as I thought it did." Further on, she testified in regard to the release. "Q. Then he paid you \$20? A. Yes, sir. Q. Took the document, and went out? A. Yes, sir. Q. I will ask you, at the time, what was your physical and mental condition. A. I was feeling very poorly. Q. Had you recovered from the blow on the head, the feeling from it? A. No, sir. Q. You have spoken about having felt stunned some time after the blow, and while you were at the hospital. Did you experience that feeling at the time this conversation was going on about this document? A. I was stunned, and I didn't realize all. Q. You did not realize all what? A. All that was going on. Q. After you had signed the document, then what occurred? A. The doctors came in again, and assured me I was all right, that I could go on my journey. Q. That was after you signed the release? A. Yes, sir."

On plaintiff's cross-examination: "Q. If I understand
Dissenting your previous statement, the claim agent stated
opinion con- he wanted to settle the matter with you, and pre-
tinued. pared a written paper of some kind, partly printed
and partly written. A. I didn't understand him that way.
I understood him to say he would give me \$20 for the in-
convenience I was put in, and for all other trouble to notify
them. The paper I was to sign was a receipt for \$20. I
didn't think there was any more to it. Q. At that time

he prepared this paper, and handed it to you? A. Yes, sir. Q. And you read it over? A. Yes, sir. Q. And, after doing so, what did you do or say then? A. I saw the release then. Q. And did you object to that, do you say? A. Yes, sir. Q. Why did you object to it? A. Because I could not release them from all of it. Q. Now, read again, please. I didn't hear you before. I wish you would read the part you objected to. A. [Reading.] 'I do hereby fully and forever release and discharge said company from any and all claims of whatever kind and character I may have on account of or arising from said accident or injuries, in consideration of the sum of twenty dollars.' Q. That is the part you objected to? A. Yes, sir. Q. Did you tell him that was the part you objected to? A. Yes, sir. Q. Did you read over the clause to him? A. I didn't read it to him. Q. What did you say to him? A. I said I could not release forever, and he said he would fix that; I would receive the twenty dollars, and to receipt that. Q. What were you to receive twenty dollars for? A. For inconvenience and any doctors. * * * Q. You handed him the paper after you made the objection that you have stated? A. Yes, sir. Q. And he said he would fix that? A. Yes, sir. Q. How did he say he would fix that? A. He said it would read only up to date? Q. Up to date? A. Yes, sir. Q. How was he going to accomplish that, so it would read up to date? A. As much as I remember, he said he would erase that. Q. Did you see him erasing anything? A. Yes, sir; I saw him take a pencil and scratch it. I thought it was that. Q. You saw him commence to scratch it? A. Yes, sir. Q. What did he do after that? A. He handed it back to me. I think it was. Q. Anything with it,—he handed you twenty dollars? A. I suppose so. Q. You remember that he handed you twenty dollars with the paper? A. Yes, sir. Q. What did you do? A. I signed my name to the paper. Q. You laid it on the table before you, and signed your name to it? A. Yes, sir. Q. Didn't you see the condition the paper was in then? A. I suppose, had I not been stunned, I would have realized right away the condition it was in; but I relied on his word. I saw an erasure. I see one now. Q. That is the same one you saw then? A. I thought this part that I objected to was erased, as he told me he would do. Q. You had the paper right there, with

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the opportunity to read it, whether you did or not, didn't you? A. Yes, sir; I suppose the paper was there. Q. You have just stated it was there? A. Yes, sir. Q. And you had an opportunity to read it? A. Yes, sir. Q. And you signed your name under those circumstances? A. Yes, sir; relying on his word. Q. You accepted that twenty dollars? A. Yes, sir. Q. You still have it? You never returned it to the claim agent or company or anybody connected with it? A. No, sir."

On plaintiff's redirect examination: "Q. How did you happen to sign your name to that paper? A. I do not know whether the claim agent handed me that or not. I remember but little of that paper. I didn't know it was in existence. Q. You did none of the writing on it except the signature yourself? A. That is all."

The receipt, as offered in evidence by defendant, reads as follows. (See opposite page.—ED.)

We give the foregoing full extracts from the record in order that the important question of the probative effect of the plaintiff's testimony, in its bearing on the issue of fraud in procuring the release, may be clearly understood by the reader. As a new trial is to be ordered, we think it due to the trial court to state what force should be ascribed to that testimony as proof of the issue raised by plaintiff's reply.

We shall attempt to give our view on that point before we close this opinion. We do not go into the details of the original cause of action. It need only be said that the evidence on that branch of the case tended to show negligence, warranting submission to the jury of the question of defendant's liability to plaintiff as a passenger on defendant's train, under the unanimous ruling of the court in banc in *Mellor v. Railroad Co.*, 105 Mo. 455, and earlier cases in this state. The plaintiff's testimony further had a tendency to prove that, after she had signed the release, she returned to the depot, and continued on her journey by rail towards St. Louis. On the way, during the afternoon of the same day, she began to experience acute pains, and later suffered a miscarriage, followed by other consequences of serious nature, which the medical evidence on her behalf ascribes to the shock of her original injury. At the time of the "settlement," neither she nor defendant's agent had any thought

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FORM 8134

ACCOUNTS PAYABLE. DISBURSEMENT VOUCHER.

Missouri, Kansas & Texas R'y Co. To Dr.

Address St. Louis, Mo.

Mrs. Wm. Och.

In full settlement and satisfaction of all claims and demands against the Missouri, Kansas & Texas Railway Company for personal injuries received while ~~in the employ of the said Railway Co~~
Passenger on train No. 2 on M. K. & T. Ry.—Caused by Ventilator Window falling—
striking her on the head—cutting head and face—

And I do hereby fully and forever release and discharge said any and all claims of whatever kind and character I may have on account from said accident or injuries in consideration of the sum of *Twenty*

Dollars

20 00

I CERTIFY, That the above account has been examined, found correct and audited.

Approved for payment:

Geo. J. Pollock,

General Auditor.

J. H. Hill,

For Pres't, and Gen'l Manager.

RECEIVED, Sedalia, Oct. 7, 1891. OF MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Twenty DOLLARS,

in full for the above account.

(WITNESS HERE.)

(SIGN HERE.)

\$ 20

Witness:

J. D. Hollister.

Mrs. Wm. Och.

NOTE.—The above Receipt must be dated and signed by the party in whose favor this Voucher is made, or when signed by another party, the authority for so doing must in all cases accompany it.

Return Voucher to B. P. McDONALD, Assistant Treasurer, Sedalia, Mo.

* The part of the above in italics indicates the written portion of the original voucher.

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or expectation of such a result, so far as this record discloses. The two legal issues of importance arise upon the release, and upon the instructions on the measure of damages. The jury found a verdict for plaintiff in the sum of \$7521.45, and judgment was rendered for that amount. Defendant appealed in due course.

1. The paramount question is upon the receipt in the nature of a release. It is not under seal. Defendant claims that the issue of fraud, raised by the reply and plaintiff's testimony, can only be dealt with as an equitable one, to be tried by the court, and not by a jury. But the trial judge submitted that issue to the jury, and defendant assigns error on the ruling.

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Plaintiff admits signing the paper and receiving the \$20 mentioned; but she does not admit agreeing to the terms of release which the paper contains. On the contrary, her evidence tends to show that she declined to sign such a release, but that she consented to accept \$20 in payment for her inconvenience and suffering "up to date" only. She declares that the defendant's agent then said he would change the form accordingly, and that he made an erasure in it, ostensibly to conform to that understanding. She then signed it, taking his word (as she says) that it expressed that agreement. She was dazed and stunned from the effects of the blow on her head, which had taken place within an hour before, and relied upon the agent's statement of the contents of the receipt. Her evidence, already quoted, tends very clearly to prove that she did not agree to the release as it stands, though she signed the paper.

The inquiry, then, is whether, if the jury and court found her statement to be true (as the verdict and judgment show that they did), the release is any bar to her action for damages not embraced within the agreement she actually made with the defendant's agent, and which she supposed, and had reason to suppose, the paper correctly recited.

In the case of *Girard v. Car Wheel Co.*, 123 Mo. 358, it was held by a majority of the court in banc that, where plaintiff signed an agreement when his mental condition was such as to render him incompetent to make a contract, that fact, when proved, would avoid the effect of his apparent contract when expressed by his signature. Is there any difference in principle between obtaining a signature to such a paper from

one who is mentally incapable of entering into an agreement (as in the Girard case) and obtaining a signature to such a paper from a woman dazed and nervous from a recent shock, by representing the contents of the paper to be different from what they are?

We say that there is no difference, so far as concerns the validity of such a document as a contract. An apparent assent thus obtained to its terms is worthless, where she believed, and had cause to believe, that she was signing an agreement of much narrower scope that had been verbally made with her. We are in favor of adhering firmly to the majority ruling in the Girard case, as founded on sound principle. We are not satisfied to express ourselves in any vague or ambiguous terms in dealing with the subject of fraud in securing such releases. It is one of the essential elements of a contract that the minds of the parties shall meet in respect of the subject-matter of the agreement. Although, presumptively, the signature to a written agreement is evidence of assent to it, so as to shift the burden of proof on that point, yet it is very clear that where a signature has been obtained by false and fraudulent representations as to the terms of the paper, and that fact is proved to the satisfaction of the triers of fact, the party who has so obtained the signature cannot (even in a court of law) take advantage of it as a bar to a just cause of action against him.

In the case in hand the plaintiff was willing to settle for \$20 for the damages she had then sustained. She had been assured by the defendant's physician that her injuries were trifling. That opinion was, no doubt, expressed in good faith. They did not know of plaintiff's pregnancy. But she, aware of her condition, refused to give a full discharge. The claim agent (according to her account) purported to put the paper in the form she desired. If the paper went beyond her assent, and her signature was obtained to it on the false assumption (induced by the acts and words of the claim agent) that it contained the agreement she intended to sign, her signature to the false form was no assent at all, in contemplation of law or equity. This is very ancient law even in the English system.

A recent British work on the law of contracts declares that if the other party to a contract which does not represent the true intent of one of the parties has "caused the mistake by

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misrepresentation, designedly, and for the purpose of inducing the contract, it is a fraud, and the contract may be avoided at law and in equity upon that ground." Leake, Cont. (Ed. 1878) pp. 336, 351, 353.

A well-known American writer on the same general subject, thus states his conclusions on the point of this discussion: "When a party has thus in form, impelled by fraud,

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tinued. put his name to something different from what he meant, he has not truly executed any contract; and his position towards the writing is not the

same as though, under a purpose to sign it created by the like fraud, he had still subscribed to what he intended (to be explained under our next subtitle). If the reader will consult some previous sections, he will see that on nearly or exactly this question there are differences of judicial opinion. But, guided by the greater number of cases now before the author, and, equally with them, by principles of the law whose effect can probably be intercepted only by special circumstances, we are conducted to the following: Such a contract is not merely voidable; it is void." Bish. Cont. (Ed. 1887) § 646.

Dr. Bigelow, in his work on Frauds (Ed. 1888), p. 53, declares: "At common law, it has often been held incompetent to a defendant sued at law on a specialty to plead that the instrument was obtained by false representations. It is a case, it is said, for equity alone. It is clearly otherwise of the execution of the instrument, as where the bond is misread to the obligor, or where his signature is obtained to an instrument which he did not intend to sign. In such cases, fraud may be alleged at law "

A number of cases in England and in this country illustrate the propriety of applying the rules of law above stated to such facts as appear here. We shall quote from but one of them, merely citing the others.

In Bliss v. Railroad Co. (1894) 160 Mass. 447, 36 N. E. 657, we find the following head notes, descriptive of a very lucid judgment on the subject of releases in this class of actions, viz.: "(1) In an action against a railroad corporation for injuries occasioned to the person and clothing of the patient, who gave to the corporation, shortly after the accident which caused the injuries, a receipt in full and a release, evidence that the oral agreement of settlement was

for a small sum, and covered merely the injuries to the plaintiff's clothing, that the defendant's agent, who procured the plaintiff's signatures, represented to him that the receipt was only for the injuries to the clothing, and that the release was merely a form, whereas they both covered his claim for personal injuries also, that the plaintiff, who at the time was in a dazed condition, signed both papers without reading them or knowing their contents, and that his personal injuries were in fact serious, will warrant a finding that the receipt and release were procured by fraud on the part of defendant's agent. (2) Where one who has sustained injuries to his clothing and also to his person by a railroad accident has been induced by fraud to execute to the railroad corporation a receipt in full and a receipt for both injuries, upon being paid a small sum, which was understood by him to be compensation merely for the injuries to his clothing, he need not return the money so received before bringing an action for the personal injuries."

See, also, on this point, *Lee v. Railroad Co.* (1871) 6 Ch. App. 527; *Hirschfeld v. Railroad Co.*, 2 Q. B. Div. 1; *Railway Co. v. Lewis*, 109 Ill. 125, 19 Am. & Eng. R. Cas. 224; *O'Neil v. Iron Co.*, 63 Mich. 690; *Ryan v. Gross*, 68 Md. 381; *Sobieski v. Railroad Co.*, 41 Minn. 169; *Butler v. Railroad Co.*, 88 Ga. 594; *Cleary v. Electric Co.*, 19 N. Y. Supp. 951, *affirmed*, 139 N. Y. 643; *Sheanon v. Insurance Co.*, 83 Wis. 507; *Smith v. Steamship Co.*, 99 Cal. 462; *Shaw v. Webber*, 79 Hun 307, 29 N. Y. Supp. 437.

Even in the federal courts, where law and equity are administered as distinct systems, it has been declared that "fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence." *Hartshorn v. Day*, 19 How. 223.

And in a very late case in the highest federal tribunal it has been held, in a unanimous opinion, that a release is not binding as a defense to an action at law if obtained in circumstances amounting to a fraud on the signer, whereby he was led into giving formal assent to a paper different from his understanding as to the scope of the agreement which he in-

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tended actually to make thereby. *Railway Co. v. Harris*, 158 U. S. 326.

The principle applied in the foregoing decisions has been recognized in Missouri in a case which holds that where full releases were obtained by a party, by inducing the belief on his part that they were mere receipts for money which the defendant owed plaintiff, he might retain the money, and repudiate the release of other claims, fraudulently introduced into the paper, and differing from the actual agreement made, as found by the triors of fact. *Vautrain v. Railroad Co.*, 8 Mo. App. 538, *affirmed* 78 Mo. 44. The idea on which the rulings above cited rest is that, as between the immediate parties, any fraudulent contrivance by which one is led to sign a paper under the belief that he is signing an agreement of a different and narrower purport cannot be allowed in a court of law or equity to bar the assertion of a just demand. Consent so obtained gives the form, but not the substance, of a contract. Hence, as between first parties, at least, it may be disregarded by any court, in the absence of evidence giving the paper validity upon some other basis; as, for instance, subsequent ratification or acceptance.

In the case at bar, Mrs. Och, no doubt, agreed to settle whatever claim she had for damages sustained at the time she signed the paper. She did not agree, but, on the contrary, declined to agree, to release damages that might result later from the injury. The gist of her whole evidence on this point is in this sentence: “\$20 was for payment up to date; if anything further should occur, to notify them, and they would be responsible.” So viewed, the adjustment was reasonable, fair, and just. If, then, on making such an agreement, she was induced to sign a release in full, in the manner she has described, such release is not her contract to the extent of its terms, and it should form no bar to her recovery for damages, subsequently developed, as the direct result of her injury.

2. Nor can the fact that plaintiff was careless in signing the paper (by accepting as true the representations of its contents made by word and act of the claim agent) conclude her from asserting the fraud, and obtaining the protection of a court of law against it. What she signed the law takes to be her act, until she shows that it is not her act; but, when that showing is made, by

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proof of a fraud whereby her signature was secured to a contract different from what it was agreed the paper should express, her trust and confidence in the other party do not transform a trick into a thing of legal beauty. Mere negligence of the defrauded does not make fraud truth, at law or in equity. This is one of those rules of law that finds its source in the ordinary instincts of natural justice. As has been said in an Illinois case: "As between the original parties to a transaction, we consider that where it appears that one party has been guilty of an intentional and deliberate fraud, by which to his knowledge the other party has been misled or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care." *Linington v. Strong*, 107 Ill. 303. Recently, in New York, it was said: "A mere device of a guilty party to a contract, intended to shield himself from the results of his own fraud practiced upon the other party, cannot well be elevated to the dignity and importance of an equitable estoppel." *Bridger v. Goldsmith*, 143 N. Y. 428. The rule we have briefly stated above (touching the bearing of negligence on positive fraud, as between the immediate parties) is well recognized in this state as elsewhere. *Cottrill v. Krum*, 100 Mo. 357; *Sav. Inst. v. Burdick*, 87 N. Y. 40; *Shrimpton & Sons v. Philbrick*, 53 Minn. 366.

3. There is no evidence in the case of any fraud other than in the procurement of the writing relied upon as a release. Both plaintiff and the physicians of defendant supposed her injuries trivial at the time they so assured her. Besides, the plaintiff's counsel at no time in the trial court made any attempt to prove that the settlement actually made for \$20, "up to date," was not valid as so stated. Hence it is vain to discuss rules of law that might be applicable had such an attempt been made.

4. The fact that plaintiff settled for part of her original claim for damages, and reserved a right of action for other damages, should they be developed, is no obstacle to her recovery for the latter. The law to that effect is very old and elemental. In *Chit. Cont.* (11th Am. Ed., 1874) p. 1151, it is declared that "a release may be made to extend to part only of a debt or claim." That proposition was

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applied to facts resembling those of the case at bar in the recent American case of *Bliss v. Railroad Co.*, 160 Mass. 447, already quoted.

5. It may not be inopportune to remark that the defendant, seeking to take benefit from the release obtained of plaintiff by the claim agent, is also bound by his statements and acts inducing her signature to that document, in so far as they bear upon its validity. *Barwick v. Bank*, L. R. 2 Exch. 259; *Aultman v. Olson*, 34 Minn. 450.

6. But while we hold that plaintiff may defend against the release as a full acquittance, because of the fraud in procuring it of her in that form, we cannot discover in her evidence any substantial basis for the finding that she "did not have sufficient mental capacity to understand the nature and effect" of her act. Yet the learned trial judge submitted that issue to the jury as a ground of avoidance of the release. Giving plaintiff's testimony a fair and reasonable construction, we cannot escape the conclusion that she fully intended to make a settlement of her known damages at the time she signed the paper. That she was dazed, and, of course, not in a normal state of mind or body, because of the recent shock, are evident facts. Those facts have a potential bearing on the view to be taken of her act in signing the receipt without reading it, after she had been led to suppose that it had been amended to conform with her wish. But illness, of itself, is not necessarily equivalent to contractual incompetency. It may or may not tend to show such incompetency. That depends on the circumstances. This court, in a late case, unanimously held a woman bound by a release she had executed, although at the time she was sick and in bed, in consequence of injuries for which the release was given. *McFarland v. Railway Co.* (Mo. Sup.; 1894) 28 S. W. 590, while, on the other hand, in the *Girard Case*, 123 Mo. 358, it was held that there was substantial testimony of mental incapacity to contract at the time the release was signed.

The test in each instance is whether or not the evidence tends to show incapacity to enter into the contract. That test must be applied by the court, as a part of its general duty to determine the legal effect of the testimony adduced. In this case, the trial court, by plaintiff's third instruction, submitted to the jury two alternatives for a finding that

plaintiff was not bound by the release,—namely, first, that she was not at the time mentally capable of entering into the agreement; and, secondly, that her consent to the document as it now reads was obtained by fraudulent contrivance, which prevented it from being regarded in law as her act.

In submitting the first of these alternatives, we think the learned trial judge was in error, upon plaintiff's own statement of the facts. She obviously understood and agreed to a release of her damages up to the time of the settlement. She must stand by that bargain, for aught that has been so far shown in this case. Her illness was not such as to relieve her from the responsibility of the agreement, knowingly made, with a full appreciation of its import. The issue of mental incapacity to make a release should not have been presented to the jury. Indeed, it is quite doubtful whether, under plaintiff's reply, she ever made any claim of that sort in avoidance of the release. For the error above indicated, the judgment must go down, for it is settled law that instructions should be based on the actual evidence. It is generally bad practice to authorize the jury to render a verdict upon a theory which there is no substantial proof before them to support.

7. Complaint is made by defendant of plaintiff's instruction on the measure of damages. It authorized compensation for "all bodily pain and mental anguish she may have suffered by reason of said injury." Yet, according to our interpretation of plaintiff's testimony, she had settled (and been paid for) all such pain and inconvenience sustained before the release was signed. The instruction should have limited the recovery to compensation for such direct and immediate results of her injury as first became known to her after the paper was signed. The allowance of "credit" for the \$20, at the close of the instruction, did not remove the error mentioned. But it is probable that the request by defendant for the sixteenth instruction (which the court gave on its behalf) should be regarded as curing this error, under our rulings to the effect that a party cannot be allowed to complain on appeal of a mistake which his own course at the trial has invited. *Stevens v. Crane*, 116 Mo. 408; *Quirk v. Elevator Co.*, 126 Mo. 279.

The sixteenth instruction is as follows: "(16) If you shall find from the evidence that, under instructions from the

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court, the ventilator fell in consequence of defendant's negligence, and Mrs. Och has not released the cause of action, then, in assessing damages, you should consider only such injuries and suffering of Mrs. Och as you may find from the evidence were the actual and proximate result of the acts or omissions of defendant's agent; and in estimating damages, you must exclude all effects resulting from other independent causes." However, as there must be a new trial, it is not necessary to examine closely the instruction referred to. Any just ground for criticism of it, or of any of the other instructions given at the former hearing, may be removed upon another trial.

8. No question was raised in the circuit court as to any duty on plaintiff's part to refund the money paid to her by defendant. She does not impeach the real settlement she says she made, and for which the money was received by her. She only asserts that she was induced by fraud to sign a paper which carried her agreement further than the terms she actually accepted. *Kirchner v. Machine Co.*, 135 N. Y. 182. We hold that the testimony tends to show such fraud, and that the trial court was right in submitting that issue to a jury, though in this ruling we do not comprehend a review of the details of the instructions at the former trial.

9. We have so far treated the paper release as in effect a general one, since all the parties have so treated it throughout the litigation. For that reason we do not go into the inquiry whether or not its terms should be differently construed, or restricted (at least in equity) so as to apply only to the damages developed at the time it was signed, and which were then within the intent and contemplation of the settling parties. Compare *Lyall v. Edwards*, 6 Hurl. & N. 337; *Railway Co. v. Blackmore*, L. R. 4 H. L. 610; *Turner v. Turner*, 14 Ch. Div. 829. We prefer to confine our rulings to the facts in judgment in the case at bar, and hence refrain from any general discussion of other phases of the law of releases or of fraud.

We agree that the judgment should be reversed, and the cause remanded.

BRACE, C. J., joins in this opinion.

BOSTON & ALBANY RAILROAD CO.

v.

O'REILLY (Patrick J.).

(158 U. S. 334.)

Failure to Object Specifically to Erroneous Admission of Evidence of Special Damage.—A judgment will not be disturbed because of the admission of evidence of special damage not alleged in the declaration, if the objection made was insufficient to apprise the court below of the specific ground urged to its admission, and therefore did not afford an opportunity to amend the declaration. (*Page 378.*)

Proof of Special Damage—Sufficiency of Proof to Warrant Verdict.—Plaintiff was permitted to estimate the annual value of his labor, based upon his interest in the business of conducting a steam-thresher, operated in partnership prior to his injuries, the earnings of which widely fluctuated, but his portion of the earnings did not appear, and no allowance was made for the wear and tear of the machinery. *Held*, that the proof was insufficient to enable the jury intelligently to fix the damages.

Same—Same.—Evidence that before the receipt of the injuries for which the damages were claimed, plaintiff disposed of his interest in the business with an intention of resuming it, together with proof of his personal earnings from participation therein, was too uncertain to be made the basis of a verdict for special damages. (*Page 379.*)

Admissibility of Hearsay Testimony as to Personal Injuries.—The admission of evidence by the nurse and physician who attended plaintiff that some time after the accident they had told them that a piece of nail had come out of his knee, and permission given to the physician to point out the scar from which he had been informed the nail had come, were improper. (*Page 380.*)

When Appellate Court will Interfere with Judgment Below.—Although the appellate court will not disturb a judgment for an immaterial error, yet if it is impossible to say that the defendant's case was not seriously affected by the improper admission of testimony, there should be a new trial. (*Page 380.*)

ERROR to the United States circuit court for the district of Massachusetts.

In October, 1890, Patrick J. O'Reilly, in the circuit court of the United States for the district of Massachusetts, brought an action against the Boston & Albany Railroad Company for personal injuries received while riding as a passenger on one of that company's trains. Case stated.

The declaration contained three counts, alleging negligence on the part of the company in respect to the condition

Injuries to Passengers Boston & A. R. Co. v. O'Reilly

of a certain truck attached to the tender of the engine which drew the train, in respect to the journal of the tender, and in respect to the condition of the defendant's track, rails, and roadbed. The defendant's answer consisted of a general denial. The trial resulted in a verdict for the sum of \$15,000, and to the judgment entered for that amount a writ of error was sued out of this court.

Samuel Hoar, for plaintiff in error.

Chas. W. Needham and *John B. Cotton*, for defendant in error.

Mr. Justice SHIRAS delivered the opinion of the court.

The first three specifications of error complain of the action of the court in permitting the plaintiff, O'Reilly, to testify as to what he had made out of his business for several years before the accident, and to give an estimate of how much he made annually by his own individual exertions; and also, in view of the fact that he had sold the business, good-will, and everything connected with the business before the accident occurred, to testify that, when he so sold out, he did it with the intention of continuing the business.

Errors
assigned.

The first objection urged to the admission of this evidence is that it went to show special damage caused to the plaintiff by the loss and interruption of his business, whereas there were no allegations of such special damage contained in the declaration. It does not appear, however, that objection was specifically made to the evidence on the ground that the declaration contained no allegations of the special damage sought to be shown; and it is perfectly well settled in this court that where a case has gone to a hearing, testimony been admitted to a jury under objection, but without stating any reasons for the objection, and a verdict rendered, with judgment on the verdict, the losing party cannot, in the appellate court, state for the first time a reason for that objection which would make it good. *Roberts v. Graham*, 6 Wall. 578; *Patrick v. Graham*, 132 U. S. 627.

Failure to
object
specifically.

Objections were made in the present case to the admission of the evidence in question, but such objections did not, in our judgment, apprise the court of the specific ground of objection now urged, and hence did not afford an opportunity of permitting an amendment of

Sufficiency of
objections.

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the declaration, upon such terms as the interests of justice might seem to require.

If, then, this were the only ground on which we were asked to proceed in disposing of these assignments of errors, we should not feel disposed to disturb the judgment, but, when we come to examine the objections that were sufficiently taken to the evidence in question, we find error so serious as to compel a reversal.

The plaintiff was permitted to make an estimate of the annual value of his labor, and the jury to find a verdict, based upon the business of a steam-thresher in which the plaintiff at one time had an interest, but which he had parted with before he met his injuries. Even if his interest had continued as an existing one till the time of the accident, and even if there had been an allegation of special damage in the declaration, there was no evidence sufficient to enable the jury to measure the amount of said special damage. The plaintiff testified that he had partners, who divided with him, but did not state in what proportions. The amounts alleged to have been earned in the business fluctuated widely. There was no allowance made for the cost and wear of the machinery. The duty of the jury to find the wages or earnings of the plaintiff, after allowing for the interest on the capital invested, and for the energy and skill of the partners, could not, in the absence of evidence on those topics, have been intelligently performed.

It is said that the court made no ruling that the plaintiff might prove the profits of his business, and in the bill of exceptions it is so stated. Still, the fact remains that the evidence was admitted, although objected to as incompetent, because the profits of the business, as it was proposed to show them, depended upon so many outside matters, and were too remote.

It further appears that, after having been permitted to put in an estimate of what his personal earnings were from participation in the threshing business, and after it appeared that such business had been brought to a close by the sale of the machine and the good-will the fall before the accident, the plaintiff was permitted, under objection, to testify that, when he sold out, he did it with an intention of resuming the business. To resume such a business would, of course, have required the purchase of

Sufficiency of
proof to war-
rant verdict.

Verdict on
uncertain
evidence.

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another plant, and it is equally obvious that the fate of a new venture was merely conjectural. Such evidence is too uncertain to be made the basis of a verdict for damages, and may well be believed to have worked substantial injury to the rights of the defendant. *Railroad Co. v. Elliott*, 149 U. S. 266.

Hearsay evi- The fourth, eighth, and ninth specifications allege error in
dence as to the court permitting the nurse and physician to testify that
extent of the plaintiff told them, some time after the acci-
injury. dent, that a piece of nail had come out of his knee,
and in permitting the physician to point out upon
the plaintiff's knee the scar of the hole out of which the
plaintiff had told him the nail had come. These matters
could not fairly be regarded as a part of the *res gestae*, but
were mere hearsay. *Railroad Co. v. O'Brien*, 119 U. S. 99,
27 Am. & Eng. R. Cas. 232.

Interference If the record disclosed no other error, the admission of this
by appellate evidence might have been passed by as immaterial. Still,
court with it is impossible to say that the defendant's case
judgment was not injuriously affected by the admission of the
below. evidence, and, while an appellate court will not
disturb a judgment for an immaterial error, yet, it
should appear beyond a doubt that the error com-
plained of did not and could not have prejudiced the rights of
the party duly objecting. *Deery v. Cray*, 5 Wall. 807; *Gilmer v. Higley*, 110 U. S. 47.

We do not deem it necessary to notice other exceptions taken to the rulings of the court below.

The judgment is reversed, and the cause remanded, with directions to set aside the verdict and award a new trial.

ABSTRACTS OF RECENT DECISIONS

Actions for Injuries and Death—Limitation of Action.—A railroad company may make an agreement fixing a reasonably shorter time than that allowed by law within which suit may be brought against it for injuries. *Texas & P. R. Co. v. Hawkins*, (Tex. Civ. App., 1895) 30 S. W. Rep. 1113, *citing* *Railroad Co. v. Hume*, (Tex.) 27 S. W. Rep. 110.

Same—Who may Sue—Action by Husband for Injury to Wife—Nebraska Statute.—Section 3, art. 1, c. 72, Comp. St., providing that every railroad company shall be liable for all damages inflicted upon the person of a passenger while being transported over its road, except

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in cases where the injury done arises from the criminal negligence of the person injured, etc., is not restricted in its application to actions by the passengers so injured, but extends to actions by third persons for damages sustained in consequence of such injuries to passengers. Therefore the rule of liability to the husband for injuries sustained by the wife is to be determined by the statute referred to. *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578. *Reaffirming Chollette v. Omaha & R. V. Railroad Co.*, 26 Neb. 159, 33 Neb. 143.

Same — Same — Same — Married Woman's Act.—The married woman's act does not deprive the husband of his right of action for the loss of services or companionship of his wife; and, notwithstanding that act, he may still recover to the extent that the injury sustained by his wife incapacitated her from performing the duties that reasonably devolve upon her in the marriage relation. *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578, *following Mewhirter v. Hatten*, 42 Iowa 288, and *reaffirming Chollette v. Omaha & R. V. Railroad Co.*, 23 Neb. 159, 33 Neb. 143.

Same—Same—Injury to Married Woman.—Where a married woman is injured by the negligence of another, two causes of action arise—one, for the wife for physical and mental suffering, past and future, loss of her earning capacity, and other elements ordinarily existing in such cases; the other, for the husband for the loss of his wife's services and society, and for reasonable expenses by him incurred. *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578, *following and reaffirming Chollette v. Railroad Co.*, 26 Neb. 159, 33 Neb. 143.

Same—Pleading—Special Plea of Contributory Negligence.—A special plea to an action against a railroad company for personal injuries "that the injuries to plaintiff's intestate, now complained of, if any were received, would not have occurred but for his faults or negligence, and that his faults and negligence contributed proximately and directly to produce said injuries, and said injuries were not the result of any wanton, reckless, or intentional act done by these defendants, its agents or servants," is defective, because too general. *Johnson v. Louisville & N. R. Co.*, (Ala.) 16 So. Rep. 75.

Same—Pleading and Proof—Negligence—Contributory Negligence—In actions against railroad companies to recover for personal injuries it must appear that the defendant's negligence was the proximate cause of the injury, and that the plaintiff was free from contributory negligence. Both these elements must concur, and the burden is upon the plaintiff to establish them. *Sirk v. Marion St. R. Co.*, (Ind. App., 1895) 39 N. E. Rep. 421, *citing Railway Co. v. Twiname*, 111 Ind. 587, 30 Am. & Eng. R. Cas. 616; *Booth St. R. Law*, §§ 378–381; *City of Valparaiso v. Ramsey*, (Ind. App., 1894) 38 N. E. Rep. 875.

Same — Same—Same—It is not incumbent on a plaintiff in an action against a railroad company for personal injuries to prove more than actionable negligence, although in his declaration he

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alleges the negligence to have been gross, wanton, etc. *Keating v. Detroit B. C. & A. R. Co.*, (Mich.) 62 N. W. 575.

Same—Same—Defective Appliances.—An allegation that “the braking apparatus of said car * * * was in bad repair, the brake chain broken, and said brake useless for the purpose of stopping said car or controlling its movements,” does not disclose such a relation of the chain mentioned to the braking apparatus as to warrant the inference that the escape of the car resulted from that cause alone, and hence it was not error to receive evidence tending to prove that the brake rod was broken and useless. *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448.

Same—Damages—Breach of Contract of Carriage on Excursion Ticket.—Where by reason of the defective condition of a locomotive a company failed to fulfil its agreement to carry a person to whom it had sold an excursion ticket back to the place from whence he had originally started, he is not entitled to exemplary damages in the absence of evidence of any personal injury or wrongful conduct on the part of the company, since such an action, being for a breach of the contract, is brought *ex contractu* and not *ex delicto*. *Hansley v. Jamesville & W. R. Co.*, (N. Car.) 25 S. E. Rep. 443, *distinguishing Purcell v. Railroad Co.*, 108 N. Car. 414, 47 Am. & Eng. R. Cas. 457.

Same—Witnesses—Competency of Husband to Testify for Wife.—In a suit against a railroad company for damages for injuries to his wife the husband is a competent witness. Rev. Civ. Code, art. 2281; Act 1888, No. 59; *Jones v. Texas & P. R. Co.*, 47 La. Ann. 383.

Same—Evidence—Proof of Negligence.—In an action against a railroad company for injury to a passenger the gist of the action is negligence; and it must either be expressly proved, or such facts shown as will support an imputation of negligence. *Saunders v. Chicago & N. W. R. Co.*, (S. Dak.) 60 N. W. Rep. 148.

Same—Same—Burden of Proof.—If evidence as to the negligence of a railroad company preponderates on neither side, the company is entitled to a verdict. *Michigan Cent. R. Co. v. Lauricella*, (Tex.) 28 S. W. Rep. 278.

Same—Same—Same.—In an action for personal injuries an instruction is not erroneous which informs the jury that “the burden is upon the plaintiff to establish the fact that her injury was caused by the railroad company by a preponderance of testimony. If the evidence should indicate the existence of an independent disease, not caused by the railroad, and which might have caused the symptoms plaintiff testified to, and you are left equally undecided as to whether the injury was caused by the railroad company or by such independent cause, you would be authorized to find for the defendant.” *Central R. & B. Co. v. Ogletree*, (Ga.) 22 S. E. Rep. 953.

Same—Same—Testimony as to Conclusions.—Where plaintiff in an action for personal injuries sustained by alighting from the train has detailed the facts relative thereto, he should not be allowed to state

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that he left the train because he saw he was in danger. *Hoehn v. Chicago, P. & St. L. R. Co.*, 152 Ill. 223; *affirming* 52 Ill. App. 662.

Same—Same—Same.—Where in an action for personal injuries alleged to have been sustained by being thrown from a moving train plaintiff has testified that she has no recollection or knowledge as to how she got off, it is error to allow her to further testify that she thought she did not jump. *Jacob v. Flint & P. M. R. Co.*, (Mich.) 63 N. W. 502.

Same—Same—Admissibility of Brakeman's Testimony as to his Duty.—The question whether a brakeman performed his duty in a given case is for the jury, and the brakeman cannot testify as to that fact. *Delaware, L. & W. R. Co. v. Ashley*, (U. S. Cir. Ct. App. 3d Cir.) 67 Fed. Rep. 209.

Same—Same—Admissibility of Conversation with Employee.—In an action by a section hand in the employ of a street-railway company for personal injuries sustained while riding upon one of the cars of the company by order of his foreman and in accordance with its custom, conversations between the plaintiff and the foreman, and between plaintiff and the motorman, concerning the position on the car which he afterwards occupied are admissible to show that he was lawfully on the car, and that the motorman was aware of his position. *Denver & B. P. R. T. Co. v. Dwyer*, 20 Colo. 132.

Same—Same—Res Gestæ.—Where the injuries are alleged to have been sustained by the closing of a gate by a brakeman against the person of a passenger as she was entering a car on an elevated railway, exclamations by the brakeman made after exclamations of pain by the passenger are not admissible as part of the *res gestæ*. *Butler v. Manhattan R. Co.*, 143 N. Y. 417.

Same—Same—Same.—Spontaneous and repeated utterances from a man in great pain from injuries received from escaping steam while on the very spot of the accident, and shortly following its occurrence, are so closely connected with, and a part of, the accident itself, that it is not error to admit them as a part of the *res gestæ*. *Delaware, L. & W. R. Co. v. Ashley*, (U. S. Cir. Ct. App. 3d Cir.) 67 Fed. Rep. 209. *Citing* *Insurance Co. v. Mosley*, 8 Wall. 397.

Same—Same—Attacking Credibility of Witness—Instructions.—Where on cross-examination of a section foreman he denies having made certain statements to persons specified as to the defective condition of a rail which caused the injury complained of, there is no error in calling such persons to testify as to the fact of the statements, where their testimony is admitted solely for the purpose of affecting the credibility of the foreman, and with the distinct understanding that it cannot be used to affect any liability on the part of the company, and the jury is properly instructed to that effect. *Dampman v. Pennsylvania R. Co.*, 166 Pa. St. 520.

Same—Same—Harmless Error in Improperly Admitting Evidence.—In an action to recover for death resulting from the alleged negligence

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of a railroad company, the admission of testimony of a physician who attended deceased that he received no compensation for his services from the defendant company or any one else is harmless error, when it does not appear that anything was shown concerning his employment or the presentation of an account. *Ranney v. St. Johnsbury & L. C. R. Co.*, (Vt.) 32 Atl. Rep. 810.

Same—Instruction. — *Duty of Conductor towards Infirm Passenger.* — Under an allegation in a complaint for personal injuries sustained by alighting from a train, that the infirmity of the plaintiff was well known to the defendant, and that it was dangerous for her to alight from the train without the aid of a footstool, which was the custom of the defendant to provide, but which was not provided in this instance, and proof in support thereof, it is not erroneous to instruct the jury that: "You know, or are presumed to know, that it is the duty of a conductor, when passengers need assistance in getting off a train, to assist them off. * * * I charge you that, if the conductor knew her [plaintiff's] condition, then it was his duty to have provided suitable means to provide against accident to her, in the condition in which he knew her to be," etc. *Madden v. Port Royal & W. C. R. Co.*, 41 S. Car. 440.

Same—Same—Characterization of Defense of Contributory Negligence as Counterclaim. — An instruction characterizing a defense of contributory negligence as a "counterclaim" is not for that reason erroneous. *Madden v. Port Royal & W. C. R. Co.*, 41 S. Car. 440.

Same—Same—Exclusion of Consideration of Alleged Negligence. — An instruction that excludes alleged negligence of the company in a specified particular is properly refused. *Louisville R. Co. v. Park*, (Ky.) 29 S. W. Rep. 455.

Same—Same—Failure to Fully Charge as to Negligent Conduct. — In an action brought to recover damages for a personal injury, an allegation in the petition that the injury was caused by the negligent management of a train of cars, whereby the engine and some of the cars were violently backed into the car in which the plaintiff was as a passenger, does not authorize the court to instruct the jury that they may find for the plaintiff if they believe the defendant was guilty of negligence in permitting the plaintiff to remain in the car after it had reached its destination, regardless of the negligent handling of the train. *Chicago, K. & W. R. Co. v. Bell*, (Kan.) 41 Pac. Rep. 209.

Same—Same—Erroneous Charge as to Negligence Authorizing Recovery. — Where the negligence charged against a railroad company is that defendant's servants wrongfully ordered him into a dangerous place, it is error to instruct the jury that if that charge was not sustained plaintiff might recover if the injury was caused by other negligence of the defendant. *Chicago & A. R. Co. v. Nelson*, 153 Ill. 89; *affirming*, 53 Ill. App. 151.

Same—Same—Authorizing Verdict on Grounds Other than those Alleged. — In an action against a railroad company to recover for

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personal injuries the allegations of the plaintiff's petition control as to the grounds upon which a verdict and judgment in his favor may be based ; and an instruction to the jury by the court which authorizes a verdict on a different ground is erroneous. *Chicago, K. & W. R. Co. v. Bell*, (Kan.) 41 Pac. Rep. 209.

Same—Same—*Effect of Attempting to Leave Car at Rest.*—An instruction as to the effect of an attempt to leave a car at rest on one side of a street, instead of waiting until it reached its usual stopping place on the other side, is not misleading as tending to inform the jury that the defense relied solely upon that fact to defeat the recovery, where other defenses were specifically alluded to in the instructions. *North Chicago St. R. Co. v. Eldridge*, 151 Ill. 542.

Same—Same—*Refusal to Submit Charge Justified by Evidence.*—In an action for personal injuries sustained in a collision on an elevated street railway in the city of New York during a heavy storm, locally known as the "blizzard," it appeared that it was the duty of the defendant, under its charter, to operate its trains, if practicable, for the convenience of the public ; that the storm, which was unprecedented, had abated ; that no accidents had occurred on the day in question on the road of the company, prior to the accident ; that defendant had continued its efforts to move its trains ; and that the forecasts of the weather were favorable, and it was *held* that it was error to refuse a charge requested by defendant "that the evidence did not justify a finding that the defendant should not have operated its railway at all at the hour when the accident occurred." *Connelly v. Manhattan R. Co.*, 142 N. Y. 377.

Same—Same—*Abstraction.*—An instruction asked by defendant company that if plaintiff was hurt accidentally he could not recover was properly refused as a mere abstraction. *Louisville R. Co. v. Park*, (Ky.) 29 S. W. Rep. 455.

Same—Same—*Invasion of Province of Jury.*—In an action by a passenger for injuries sustained while between the tracks by direction of the train hands for the purpose of closing the door of a freight car, an instruction which informs the jury as a matter of law that the plaintiff was rightfully between the tracks is erroneous when that question is in issue. *Chicago & A. R. Co. v. Nelson*, 153 Ill. 89, *affirming* 53 Ill. App. 151.

Same—Province of Court and Jury—*Duty of Court.*—It is only when the facts are such that all reasonable men must draw the same inference from them that it becomes the duty of the court to decide the question of contributory negligence. *Eichorn v. Missouri, K. & T. R. Co.*, (Mo.) 32 S. W. Rep. 993, *citing* *Railway Co. v. Ives*, 144 U. S. 408; *Omellia v. Railroad Co.*, 115 Mo. 205.

Same—Same—Same.—It is for the court to say what negligence is, and to state, as a matter of law, what are the duties of a common carrier, and then for the jury to apply the facts as proved, and say whether or not there was negligence. *Madden v. Port Royal & W. C. R. Co.*, 41 S. Car. 440.

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Same—Same—*Proper Loading of Car.*—When it is contended on behalf of plaintiff that logs were improperly loaded on a car, and that by reason thereof a log rolled off and caused the derailment of the train, and proof is offered to sustain the contention, the question is for the jury. *Keating v. Detroit B. C. & A. R. Co.*, (Mich., 1895) 62 N. W. Rep. 575.

Same—Same—*Train Breaking Apart—Negligence of Employés—Inspection of Train.*—Whether, in view of rules promulgated by the company, brakemen were negligent in occupying the positions they did at the time of the breaking apart of a train, whether the inspection of the train at a place three miles or so from where the train broke was negligent or otherwise, and whether after the train broke it was negligence for a wildcat engine to stop 10 to 15 feet behind the broken-off part of the train, are questions for the jury. *Delaware, L. & W. R. Co. v. Ashley*, (U. S. Cir. Ct. App. 5 Cir.) 67 Fed. Rep. 209.

Same—Speed—Derailment by Negligent Loading of Car—Speed and Absence of Bell-cord.—When personal injuries are sustained by the derailment of a car because of a log rolling from the train, it is proper to submit to the jury the speed of the train and the absence of a bell-cord as bearing on the question of whether the logs were loaded negligently. *Keating v. Detroit B. C. & A. R. Co.*, (Mich.) 62 N. W. Rep. 675.

Same—Same—*Contributory Negligence.*—Among special findings were a number of isolated facts in relation to the conduct of the plaintiff's wife and of the railroad company, upon which the defendant sought to have judgment rendered. *Held*, that the court properly refused to render judgment upon such findings, because the inference as to whether such facts constituted contributory negligence was for the jury, and not for the court. *Omaha & R. V. Co v. Chollette*, 41 Neb. 578, *following and reaffirming* *Chollette v. Railroad Co.*, 26 Neb 159, 213 Neb. 143.

Same—Findings—*Justification by Proof—Warnings.*—A finding that a passenger riding on the footboard of a trolley car did not hear warnings by the conductor to look out for trolley poles, is justified by testimony of the plaintiff, his companion, and several other witnesses who were favorably situated to hear such warnings, that they did not hear them. *Elliott v. Newport St. R. Co.*, (R. I.) 31 Atl. Rep. 694.

Same—Damages—Elements of Damages—*Deprivation of Prospective Offspring.*—In an action by a husband to recover for loss of his wife's services because of injuries inflicted on her by an employé of a railway company, whereby a miscarriage was produced, the plaintiff is not entitled to damages for the "deprivation of prospective offspring" *Butler v. Manhattan R. Co.*, 143 N. Y. 417.

Same—Same—*Diminished Earning Capacity.*—Under an averment that by reason of an injury inflicted by a police officer in the employ of a railroad company the plaintiff suffered, and still suffers,

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great mental and physical pain; that he is disfigured in his face by the loss of an eye; that he suffers, and during his life must continue to suffer, the loss of sight of that eye, damages may be recovered on account of general diminished earning capacity, since the resulting damage is obvious. *Texas & P. R. Co. v. Bowlin*, (Tex. Civ. App.) 32 S. W. Rep. 918.

Same—Same—Compensatory Damages—Simple Negligence.—Where the negligence for which a railroad company is liable is not gross and malicious, it is liable for compensatory damages only. *Conway v. New Orleans & C. R. Co.*, 46 La. Ann. 1429.

Same—Same.—Where a passenger is injured in endeavoring to alight from a train through the negligence of the railroad company, but where there is nothing in the conduct of the employés in charge of the train to indicate malice or oppression, or any wanton, wilful, or deliberate disregard of the rights of the injured passenger, no exemplary damages can be allowed. *Atchison, T. & S. F. R. Co. v. Stewart*, (Kan.) 41 Pac. Rep. 961.

Same—Same—Allowance of Attorney's Fees in Addition to Exemplary Damages.—In an action against a railroad company for personal injuries an allowance for attorney's fees, apart from and in addition to an allowance for exemplary damages, is erroneous. *Atchison, T. & S. F. R. Co. v. Stewart*, (Kan.) 41 Pac. Rep. 961.

Same—Same—Excessive Damages—Permanent Injury to Ankle.—The plaintiff jumped from a moving train, in order to escape a threatened collision with a runaway freight car, due to the negligence of the defendant. In jumping she severely injured her left ankle, and was unable to sleep, on account of pain, for seventy hours, was confined to her bed three weeks, and unable to walk without the assistance of crutches for five months. A surgeon, who examined the injured limb the following day, testified that, from the crepitus or grating sound observable on moving and pressing upon the ankle, there was an evident fracture of the astragalus or ankle bone. At the time of the trial, three years later, her ankle was still enlarged, and extremely sensitive, with partial ankylosis or permanent stiffness of the joint, and evidence tending to prove that such condition, including present lameness, would be of long duration, and probably permanent. *Held*, that a verdict of \$3000 is not excessive. *St. Joseph & G. I. R. Co. v. Hedge*, (Neb.) 62 N. W. Rep. 887.

Same—Same—Injury to Spine of Plaintiff's Wife.—A verdict of \$4000 awarded to a husband for injuries to his wife which caused traumatic fever and resulted in a serious and incurable disease of the spine, is not excessive. *International & G. N. R. Co. v. Mulliken*, (Tex. Civ. App.) 32 S. W. Rep. 152.

Same—Same—Loss of Eye.—For the loss of sight of an eye a verdict of \$5000 is not excessive. *Texas & P. R. Co. v. Bowlin*, (Tex. Civ. App.) 32 S. W. Rep. 918.

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Same—Same—Severe Personal Injury Causing Epilepsy.—A verdict of \$6750 is not excessive for injuries sustained by being thrown from a street car, where it appears that prior to the injury the person injured was a strong, vigorous young man, and that thereafter he was a wreck physically and mentally and subject to epileptic fits. *Gideonsen v. Union Depot Co.*, (Mo.) 31 S. W. Rep. 800.

Same—Same—Loss of Portion of Foot.—A verdict of \$6950 for a man 23 years of age who, by losing portion of his foot, was prevented from working for 14 months, and who, prior to the injury, earned \$45 a month and his board, is not excessive. *Elliott v. Newport St. R. Co.*, (R. I.) 31 Atl. Rep. 694.

Same—Costs as Affected by English County Court Act.—An action brought by a railway passenger against a company for personal injuries caused by the negligence, or misfeasance, of a servant of the company, is an action founded upon tort and not upon contract, even though the passenger has taken a ticket; and if the action is brought in the High Court and the plaintiff recovers damages to the amount of £20, he is not within s. 116 of the County Courts Act, 1888, and is therefore entitled to his full costs of the action. *Taylor v. Manchester, Sheffield & Lincolnshire Railway Company*, [1895] 1 Q. B. Div.

Same—Appeal—Sufficiency of Assignments of Error—Motion for new Trial.—C. sued a railroad company on account of personal injuries sustained by his wife. The jury returned a general verdict for the plaintiff, and a number of special findings. The court overruled defendant's motion for judgment on the special findings, and sustained plaintiff's motion for a new trial. A second trial resulted in another verdict and a judgment for plaintiff. The defendant assigned as error the overruling by the court of its motion for judgment on the special findings at the first trial. *Held*, that as it was nowhere pointed out wherein the district court erred in sustaining the motion for a new trial, and as there were assignments in such motion referring to matters not preserved in the record, this court must assume that the motion for a new trial was properly sustained, and therefore the motion for judgment properly overruled. *Omaha & R. V. Co. v. Chollette*, 41 Neb. 578. See also *Chollette v. Railway Co.*, 26 Neb. 159, 33 Neb. 143.

Same—Same—Effect of Granting New Trial to one Joint Defendant.—Where a lessor railroad company is sued jointly with its lessee for damages caused by the alleged negligence of the lessee, and after verdict, the lessor moves for judgment thereon and makes no motion for a new trial, but the lessee company does, and both motions being refused, they appeal from the judgment, the granting a new trial to the lessee is in effect a vacation of the judgment as to both defendants. *Fillette v. Lynchburg & D. Co.*, 115 N. Car. 662.

Same—Same—Consideration of Errors in Instructions.—In considering alleged errors in a charge the charge will be considered as a whole,

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and not in detached portions. *Madden v. Port Royal & W. C. R. Co.*, 41 S. Car. 440; *citing* *Bauskett v. Keitt*, 22 S. Car. 187.

Same—Same—Conclusiveness of Verdict.—When the evidence is conflicting as to whether personal injuries sustained in alighting from a street-car were caused by the worn condition of the car step and the accumulation of mud thereon, the verdict will not be set aside. *Louisville R. Co. v. Park*, (Ky.) 29 S. W. Rep. 455.

Same—Same—Same.—Where in an action for personal injuries sustained by falling from the platform of a crowded car, the evidence is contradictory as to whether plaintiff was invited to go on the car after it was crowded and as to whether he was forced off by jostling and pushing occasioned by the act of the conductor, the finding of the jury is conclusive. *Dennis v. Pittsburgh & C. S. R. Co.*, 165 Pa. St. 624.

Same—Same—Same.—In an action against a street-railway company for personal injuries, sustained by being thrown down by the starting of a street-car, plaintiff's testimony that the car was started after it was stopped to allow her to alight, stood alone and was contradicted by several witnesses who testified that she attempted to alight before the car stopped, and the appellate court *held*, that there being no circumstance in the case which made plaintiff's story intrinsically improbable or incredible, it was not error to refuse to set aside the verdict. *Hardy v. Milwaukee St. R. Co.*, 89 Wis. 183. *Distinguishing* *McCoy v. Milwaukee St. R. Co.*, 82 Wis. 815.

Reasonableness of Settlement.—Conceding to a person who executed a release an unquestioned and undebatable right to recover, and that her damages, including loss of property, as well as personal injuries, ought not fairly to exceed twelve or fifteen hundred dollars, the prompt settlement of the case at a compromise of five hundred dollars is a reasonable and fair adjustment. *Barker v. Northern Pac. R. Co.*, (U. S. Cir. Ct. E. D. Mo. E. D.) 65 Fed. Rep. 460.

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SAME v. STEWART.

(155 U. S. 333.)

Duty to Passenger of Company Forming Part of Through Route—Liability of Initial Carrier.—It is the duty of a railroad company which receives passengers for transportation to points upon connecting lines to safely carry them to the end of its own line and there deliver them to the next carrier in the route beyond; and in the absence of any agreement to extend its liability beyond its own lines none will attach. (*Page* 395.)

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Same—Inference of Agreement by Initial Carrier to Extend its Liability Beyond its Own Line.—The agreement of an initial carrier to extend its liability beyond its own line must be established by clear and satisfactory evidence, and will not be inferred from doubtful expressions or loose language. (*Page 395.*)

Liability of Company for Injuries Received on Connecting Line—Evidence of Relation of Company with Connecting Lines.—To establish the liability of a railroad company for personal injuries by reason of an alleged existing agreement between it and other companies by which all were jointly interested in the running and management of a continuous line of road, or because of business relations existing between the companies at the time of the accident, it is necessary that the evidence should satisfactorily establish the existence and nature of such relations. (*Page 396.*)

Same—Same—Ownership of Stock and Bonds of Company Forming Part of Continuous Route.—The fact that a railroad company owns stock and bonds of other companies whose roads together with its own form a continuous line, does not tend to show a partnership or an agreement on the part of the former to operate the lines of the latter on a common account. (*Page 400.*)

Same—Same—Payment for Goods Destroyed by Collision on Connecting Line.—While the fact that a railroad company paid consignees for goods destroyed in a collision on roads which with its own formed a continuous line may justify an inference as to an agreement between such company and the owners of the goods destroyed as to its responsibility therefor beyond its own line, yet it will not tend to show that the responsibility arose out of a contract between the railroad companies. (*Page 400.*)

Same—Same—Advertisement as to Carriage of Passengers on Continuous Route without Change.—The fact that a railroad company advertised that it ran trains or connected with trains of other companies so as to form a through line without breaking bulk or transferring passengers does not tend to show any agreement or contract between the companies share profits and losses. (*Page 400.*)

Joint Liability of Companies Using Track and Operating Trains in Common for Injuries Sustained by Collision.—In an action to recover for personal injuries sustained by a collision on a route formed by the connecting lines of road of three different railroad companies using the route in common, it appeared that the collision took place between a train on which the injured persons were engaged as postal clerks, and which belonged to a company who paid for the privilege of running over the route, and a train of one of such other companies; that the gross earnings of the three owners of the route, the sums received for transporting the mails and the amounts received from such other company for the privilege of using the route went into the hands of a common treasurer, and were by him divided among the three companies apparently in proportion to the miles of track of each company; that the operating and accounting officers of the three companies were the same; that the train in question was at the time of the collision on a portion of the road belonging to one of such three companies; that the engineer and fireman were employes of another of such companies, and that the engine was that of the third of such companies, the conductor and brakemen being also its employes, and that the train belonging to the company having the privilege of using the track was in charge of a pilot employed and paid by the three companies in pursuance to an arrangement to that effect. *Held*, that standing by themselves the facts warranted a

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finding of joint liability on the part of the three companies for the injuries sustained. (*Page 401.*)

Liability for Personal Injuries, of Company in Hands of Receiver, but Controlled by its Own Officers and Employees.—A railroad company is liable for personal injuries sustained by a passenger, although it is in the hands of a receiver, if it is practically managed and controlled by the agents and employes of the company, and the receiver's function as to its business with connecting lines is restricted to receiving its share of the net earnings. (*Page 402.*)

Liability for Personal Injuries, of Company in Hands of Mortgage Trustees but Not Exclusively Under Their Control.—One of the three companies set up that at the time of the accident its road was in the hands of mortgage trustees, and for that reason it was not a common carrier. There was evidence which permitted the jury to pass on the question of the exclusive possession by the trustees. *Held*, that an instruction that to acquit the company from responsibility it should be shown that the management and operation of the road was conducted by the trustees to the entire exclusion of the company and its officers and that this was so notorious that it could be presumed to be known to the public, did not constitute error.

ERROR to the Supreme Court of the district of Columbia.

Enoch Totten, for plaintiffs in error.

Wm. A. Cook and *W. L. Cole*, for defendants in error.

Mr. Justice SHIRAS delivered the opinion of the court.

These were suits brought in the supreme court of the District of Columbia, and tried at special term, in July, 1885, based upon allegations of personal injuries received by the plaintiffs while in the performance of their duties as railway postal clerks on the mail route which extended from Charlotte, N. C., to Washington, D. C. Case stated.

The cases were tried together, and each of the plaintiffs obtained a verdict and judgment, entered May 3, 1890, against all of the defendants except the Virginia Midland Railway Company. The other defendants, namely, the Pennsylvania Railroad Company, the Baltimore & Potomac Railroad Company, the Alexandria & Fredericksburg Railway Company, and the Alexandria & Washington Railroad Company, appealed to said court in general term, where the judgment of the special term was affirmed, and afterwards they caused the cases to be brought here on writs of error.

The undisputed facts in the cases are substantially as follows: About four miles from Washington, at a place known as "Four-Mile Run," the tracks of the Alexandria & Washington Railroad were laid through a short tunnel or culvert under a canal. This culvert was not of suffi- Facts.

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cient width to permit trains to pass each other therein, and the double tracks, which extended over the whole line, closely interlaced in the culvert, and for a short distance from each end thereof; but each track remained practically unbroken and independent, so that in passing this point it was not necessary that a train on either track should stop, provided no other train was upon or about to be upon this portion of the road where the tracks converged. In or near this culvert, at about 10 o'clock on the night of the 19th of February, 1885, while the plaintiffs were engaged in the performance of their duties as postal clerks in a car attached to a north-bound passenger train of the Virginia Midland Railway Company, a collision occurred upon the interlaced tracks between that train and a fast-freight train of the Alexandria & Fredericksburg Railway Company, bound south, which resulted in the death of four persons, and in serious injuries to each of the plaintiffs.

The essential allegations of both declarations filed by the plaintiffs were that all of the defendant companies were engaged as common carriers, in the transportation of passengers, persons, and freight upon and along the several lines of the railroads belonging to them, and along the line, among others, of the Alexandria & Washington Railroad Company, under an arrangement or contract, for their common benefit, by which they were interested jointly in the running and management of their roads, and that through the negligence of the defendant companies the collision occurred which caused the injuries complained of.

The defendants all appeared to the action, and severally put in pleas of not guilty, and afterwards, upon leave granted by the court, each company filed an additional plea averring that "it was not at the time of the alleged injury, and never was, a common carrier of passengers and freight in manner and form as in said declaration alleged."

A large amount of evidence was put in on behalf of the plaintiffs for the purpose of sustaining their allegations of negligence on the part of employés of one or more of the defendant companies, and to show that the roads owned by those companies were operated in connection with each other on joint account, or that there was such community of interests among them as would make all of them liable for the acts of agents or employés of one.

The Virginia Midland Railway Company introduced evidence which tended to prove that its road extended no further north than Alexandria, and that its trains were run over the roads of the other companies under an arrangement by which it paid certain prices per passenger and per ton of freight for the running privileges given it, and by which it was required to admit on board its north-bound trains at Alexandria an agent of the company or companies which controlled the road north of that place, who had therefrom the exclusive direction of the trains. It appeared, however, that, although such agent was on the passenger train in question, employes of the Virginia Midland Railway Company performed the actual work of controlling the train.

The evidence on the part of the other defendants was directed mainly to showing that at the time of the collision the road of the Alexandria & Washington Railroad Company and the franchises necessary for its operation were in the hands of a receiver appointed by the circuit court of the United States for the eastern district of Virginia, that the company had no rolling stock, but that the receiver permitted other roads to use its tracks, under certain agreements which had been made between that company and other companies before his appointment; and that the business of the Alexandria & Fredericksburg Railway Company was being carried on by trustees who were possessed of the property and franchises of this company by virtue of a deed of trust executed by it on June 1, 1866, to secure the payment of the principal and interest of certain of its first mortgage bonds.

Facts continued.

Many exceptions were taken by the defendants during the trial to the admission and rejection of evidence, to the refusal of the court to give the jury certain instructions proposed by them, and to the giving of other instructions against their objections. These exceptions constitute the grounds of the assignments of error.

The suits were brought against the Pennsylvania Railroad Company, a corporation organized under the laws of the state of Pennsylvania; the Baltimore & Potomac Railroad Company, a corporation organized under the laws of the state of Maryland and acts of the congress of the United States; the Alexandria & Washington Railroad Company, the Virginia Midland Railway Company, and the Alexandria & Fredericks-

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burg Railway Company, which three last-mentioned companies were corporations organized under the laws of the state of Virginia.

The theory upon which the plaintiffs proceeded, in including these five companies in the actions, was thus expressed in the declarations:

“For that heretofore, to wit, on the 19th day of February, 1885, and prior thereto, the said defendants were engaged, as common carriers, in the transportation of passengers, persons, and freight upon and along the several lines of railroad belonging to said companies, and, among others, along the line of the road of the said Alexandria and Washington Railroad Company, running between the cities of Alexandria and Washington, under an arrangement or contract for their common benefit, the full and exact terms of which are unknown to this plaintiff, and by which they were jointly interested in the running and management of the said railroads.”

The Pennsylvania Railroad Company filed a plea of not guilty, and a special plea that said company “was not at the time of the alleged injury, and never was, a common carrier of passengers and freight in manner and form as in said declaration alleged.”

Facts continued.

After the testimony was closed on both sides, the counsel of the Pennsylvania Railroad Company moved the court to instruct the jury that, upon the pleadings and evidence, the said company was entitled to a verdict in its favor. To the refusal of the court to grant such instruction, exception was duly taken, and that action of the court is here assigned for error.

As it is not pretended that there was not evidence sufficient to warrant the jury in finding that the plaintiff's injuries were caused by carelessness in the management of one or both of the trains, our inquiry must be directed to the other issue; that is, whether it was shown, by competent evidence, that the Pennsylvania Railroad Company was engaged, at the time of the accident, as a common carrier, in the transportation of freight and passengers along the line of the road of the Alexandria & Washington Railroad Company, running between the cities of Alexandria and Washington, under an arrangement or contract with the other companies defendant for their common benefit, and by which they were jointly interested in the running and management of said railroad.

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It is conceded, or sufficiently appears in the evidence, that the running and management of the road of the Alexandria & Washington Railroad Company were not within the scope of the ordinary powers of the Pennsylvania Railroad Company as a corporation of the state of Pennsylvania. To render the latter company responsible for what might take place on a railroad in another state, some contract or arrangement to that effect must be made to appear.

It is also disclosed by the evidence that neither of the trains by whose mismanagement the accident was caused was a train belonging to the Pennsylvania Railroad Company, and that the men in charge were not in the immediate employ of that company.

The general principles applicable to the present inquiry are were settled, and have frequently been declared by this court. In *Railroad Company v. Manufacturing Co.*, 16 Wall. 324, it was said: "It is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line, and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts in this country, and is in itself so just and reasonable that we do not hesitate to give it our sanction." And in *Railroad Co. v. Pratt*, 22 Wall. 129, it was said: "The fair result of the American cases limits the carrier's liability as such, when no special contract is made, to his own line." These cases were followed in *Myrick v. Railroad Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; and it was there said: "In the absence of a special agreement to extend the carrier's liability beyond his own route, such liability will not attach; and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."

Duty to passenger of company forming part of continuous route.

Inference of agreement by initial carrier.

Was there shown, then, in the present case, a special contract or undertaking by the Pennsylvania Railroad Company that the plaintiffs should be safely carried in the train of the Virginia Midland Railway Company, while proceeding along the road of the Alexandria & Washington Railroad Company, between the cities of Alexandria and Washington?

There was no attempt to show any such contract or agreement between these plaintiffs and the Pennsylvania Railroad Company. The liability of the latter is sought to be found in

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an alleged existing agreement between that company and the other companies defendant, whereby the said companies were "jointly interested in the running and management of said railroads."

Moreover, it was not claimed that this alleged agreement was in writing, or was to be found in any resolution of the board of the Pennsylvania Railroad Company. Indeed, the averment of the declaration was that "the full and exact terms of the alleged contract were unknown to the plaintiffs."

The right of recovery in this case against the Pennsylvania Railroad Company was rested by the plaintiffs entirely upon supposed business relations existing, at the time of the accident, between the railroad companies defendant. It is necessary, therefore, that they should point to evidence satisfactorily establishing the existence and nature of those business relations. A careful consideration of the evidence appearing in the record has failed to satisfy us that there existed a contract or agreement between these railroad companies upon which liability on the part of the Pennsylvania Railroad Company can be based. Let us briefly consider the particulars of the evidence relied on by the plaintiffs.

The annual reports to the stockholders of the Pennsylvania Railroad Company were put in evidence. That of March 2, 1885, contained the following statement:

Evidence reviewed. "The board herewith submit their report for 1884, with such data relating to the lines controlled by your company as will give you a clear understanding of their physical and financial condition."

Also the following:

"The Baltimore and Potomac railroad connects your line with Washington and the South."

And from the report of March, 1886, the following quotation was cited:

"The board herewith submits its report for the year 1885, with such data as relate to the lines embraced in your system as will give you a clear understanding of their physical and financial condition."

It was also shown by said report that the Pennsylvania Railroad Company owned, on December 31, 1885, \$1,000,000 of the bonds of the Alexandria & Fredericksburgh Railway Company, and \$2,000,000 of the bonds of the Baltimore &

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Potomac Railroad Company, and 60,852 shares of the Baltimore & Potomac Railroad Company's stock, and 217,819 shares of the stock of the Philadelphia, Wilmington & Baltimore Railroad Company.

A railroad map showing a continuous line of railroad between Philadelphia and Quantico, with letters signifying that the roads embraced the reinwere the Philadelphia, Wilmington & Baltimore, the Baltimore & Potomac, the Alexandria & Washington, and the Washington & Alexandria Railroad Companies, was put in evidence.

It was also proved that a ticket issued by the Pennsylvania Railroad Company was sold in Baltimore, at the office of the Northern Central Railroad Company, on account of the Alexandria & Fredericksburg Railway Company, and it was likewise proved that the Pennsylvania Railroad Company owned stock in the Alexandria & Washington and the Alexandria & Fredericksburg Railway Companies, and that some persons who were officers of the Pennsylvania Railroad Company were likewise officers of these companies. It was also shown that the employés of the Baltimore & Potomac, the Alexandria & Washington, and the Alexandria & Fredericksburg roads were paid from a pay car whose brakeman and conductor wore a blue uniform with silver buttons, which was said to be the uniform of the Pennsylvania Railroad Company.

Evidence
reviewed.

Newspaper advertisements were put in evidence calling the attention of the travelling public to the "Great Pennsylvania Route to the Northwest and the Southwest," and it was shown that James R. Wood was general passenger agent, and Charles E. Pugh general manager of the Pennsylvania Railroad Company, stationed at Washington; and it likewise appeared that they occupied similar positions in the Philadelphia, Wilmington & Baltimore, the Baltimore & Potomac, Alexandria & Washington, and the Alexandria & Fredericksburg Companies.

John S. Barbour testified that he had acted for some years as president and receiver of the Virginia Midland Railway Company, his official relations with that company ceasing in the latter part of 1884. His testimony was to the effect that he had made arrangements for the running of the trains of the Midland Railway Company over the road between Alexandria and Washington. He says that there was no contract ever

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signed, but that his conversations were with officers of the Pennsylvania Railroad Company, particularly naming Mr. Scott and Mr. Roberts, the latter being president of both the Pennsylvania Railroad Company and the Alexandria & Fredericksburg Railway Company; that the Pennsylvania authorities were running the Baltimore & Potomac, and a through line from New York to Quantico; that the Midland Railway Company was to pay 35 cents for each passenger, and so much on freight, for each car load or by the ton; that the Midland Railway Company used its own rolling stock and crews. He further stated that he would not say to whom or to what companies his company paid compensation for the use of the road, and that his recollection of the details of the agreement was indistinct, as it was made in 1876. On cross-examination he stated that his company settled accounts with the officers of the Baltimore & Potomac Railroad Company or those of the Alexandria & Fredericksburg Railway Company.

Evidence reviewed. The plaintiffs further gave evidence to show that on the arrival of the trains of the Virginia Midland Railway Company at Alexandria they were turned over to the authorities operating said roads between that place and Washington, and run between those two points, both ways, under the absolute control of the last-named parties, who had the right to and did place a pilot in charge of said trains to run the same between those points; that said pilots were sometimes employés of the Baltimore & Potomac Railroad Company, and sometimes of the Alexandria & Fredericksburg Railway Company; that all other persons engaged in running said Virginia Midland trains were employés of the last-named company; that the pilot who took charge of the Virginia Midland train on which the plaintiffs were on the 19th day of February, 1885, when it arrived at Alexandria, and under whose direction and control it was at the time and place of the accident, was Charles F. Bennett, whose uniform was such as is worn by the employés of the Pennsylvania Railroad Company, except that on the buttons were the letters "B & P," and whose name was on the pay rolls of, and he was paid by, the Alexandria & Fredericksburg Railway Company.

In connection with the foregoing, there was evidence, proceeding partly from both parties, tending to show that the mails over said route between Alexandria and Washington were carried, not under any express contract, but under the

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general statutes, and the arrangement of the government for carrying all mail, either through or local, between Washington and Alexandria, was with the Alexandria & Washington Railroad Company, and that road was paid for transporting, for the quarter beginning January 1, and ending March 31, 1885, by drafts or checks, and that no other railroad was paid by the United States for conveying mails between said points; that said sum so paid was divided among the Alexandria & Washington, the Alexandria & Fredericksburg, and the Baltimore & Potomac Railroad companies; that about the time of said collision, and for some time prior thereto, both freight and passenger trains passed over the road between Alexandria and Washington, some of them hauled by engines "B. & P.," some of them marked "A. & F.," and some passenger trains marked "B. & P.;" that the compensation paid by the Virginia Midland Railway Company for the privilege of running its trains between Washington and Alexandria was 35 cents per passenger, and \$4 per car-load of freight, which was paid by it periodically to J. S. Lieb, the treasurer of the Alexandria & Washington, Alexandria & Fredericksburg, and Baltimore & Potomac Railroad Companies.

The plaintiffs further showed that the Pennsylvania Railroad Company paid consignees for goods destroyed in the collision, and then made demand upon Wilkins, the receiver of the Alexandria & Washington Railroad Company, for reimbursement, and claimed this fact as admission that the Pennsylvania Railroad Company was a common carrier of these goods at the time and place of destruction.

The foregoing is a condensed statement of the evidence relied on as establishing such a relation between the railroad companies owning the roads and managing the trains at the time and place of collision and the Pennsylvania Railroad Company as to make the latter responsible to the plaintiffs for their injuries.

Some of this evidence was objected to by the counsel of the Pennsylvania Railroad Company as incompetent for the purpose for which it was offered. But we do not deem it necessary to critically examine these objections. Taking the plaintiffs' evidence as a whole, and supplementing it with such facts favorable to them as appear in the defendants' evidence, we are unable to see that a case was made out as against the Pennsylvania Railroad Company.

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That the Pennsylvania Railroad Company owned stock and bonds of some of the other companies defendant did not tend to show a partnership or agreement to run the roads of the latter on common account. Such ownership rather went to explain why some of the officers of the Pennsylvania Railroad Company held official positions in the other companies, and to show why their officers were consulted about the arrangement made between the Alexandria & Washington, the Alexandria & Fredericksburg, and the Baltimore & Potomac Railroad companies, and the Virginia Midland Railway Company for the use by the latter of the roads of the former between the cities of Alexandria and Washington, as testified to by J. S. Barbour, and also explains the references made in the reports of the Pennsylvania Railroad Company to these roads as connecting with their system.

**Ownership of
stock and
bonds of
connecting
companies.**

That the Pennsylvania Railroad Company paid consignees for goods destroyed in the collision may justify an inference that there was some agreement between the owners of the goods and the Pennsylvania Railroad Company that the latter should be responsible for the goods beyond their own line, but in that event the responsibility arose out of such contract, and not out of a contract between the railroad companies. It was, indeed, contended that the act of the Pennsylvania Railroad Company in demanding reimbursement from the Alexandria & Washington Railroad Company for a proportion of such payment is indicative of an existing arrangement between the companies for dividing such losses. But an examination of the evidence, in this particular, plainly shows that, though the words "Proportion Due" appear at the head of the column stating the amount demanded, yet the actual demand was for the entire loss, and not for a part or proportion thereof. Such a demand, therefore, is evidence that no agreement existed for a participation in losses.

**Payment for
goods destroyed
by collision.**

That the Pennsylvania Railroad Company advertised that it ran trains, or connected with trains of other companies, so as to form through lines, without breaking bulk or transferring passengers, did not tend to show any contract or agreement between the companies to share profits and losses. Nor was there evidence, in the present case, that there was any actual participation by

**Advertisement
of through
route**

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the Pennsylvania Railroad Company in the earnings of the other companies which used the road between the cities of Alexandria and Washington. On the contrary, the evidence affirmatively showed that such earnings, including what was paid by the United States for the transportation of mails, were divided between the other companies, and went, none of them, to the Pennsylvania Railroad Company.

Without dwelling longer on this feature of the case, our conclusion is that the Pennsylvania Railroad Company was entitled to the peremptory instruction asked for in its favor.

Our views respecting the exceptions urged on behalf of the other plaintiffs in error are briefly expressed as follows: There was evidence from which the jury might properly infer that the railroad between the cities of Alexandria and Washington was managed and controlled for the common use of the Baltimore & Potomac Railroad Company (owning that portion of the route that lies between Washington and the south end of the Long Bridge), the Alexandria & Washington Railroad Company (owning that portion between the south end of the Long Bridge and St. Asaph's Junction), and the Alexandria & Fredericksburg Railway Company (owning the line between St. Asaph's Junction and Alexandria); that the gross earnings of these companies, derived from this line between Alexandria and Washington, including what the Virginia Midland Railway Company paid for the privilege of running its trains over these tracks, and what was received for transportation of mails, went into the hands of a common treasurer, and were by him, after paying operating expenses, divided among the three companies, according to some rule, not very definitely shown, but apparently in proportion to the miles of track of each road; that the operating and accounting officers of the three companies were the same; that the freight train in question was, at the time of the collision, on that portion of the road which belonged to the Alexandria & Washington Railroad Company; that the engineer and fireman were employes of the Baltimore & Potomac Railway Company; that the engine was that of the Alexandria & Fredericksburg Railway Company; that the conductor and brakeman were employes of that company; and that the passenger train was in charge of a pilot employed and paid by the three companies, in pursuance of an arrangement to that effect.

Joint liability
of companies
using track
and operating
trains in
common.

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Such a state of facts would, we think, warrant a finding of joint liability of these three companies to the plaintiffs, unless certain facts put in evidence by the Alexandria & Washington Railroad Company and by the Alexandria & Fredericksburg Railway Company exonerate them respectively from such liability.

The Alexandria & Washington Railway Company filed a plea of not guilty, and likewise a plea denying that said company was, at the time of the alleged injury, a common carrier of passengers and freight in manner and form as in the declaration made.

In support of the issues thus formed, the Alexandria & Washington Railroad Company put in evidence a record of the circuit court of the United States for the eastern district of Virginia showing that in a suit of Alexander Hay against said company, on January 19, 1882, George C. Wilkins was appointed receiver of said company, and was directed, after giving bond, to take possession of the railroad, tracks, engines, and property, real and personal, to the company belonging, and to run and operate said railroad for the carriage of freight and passengers, and to make from time to time all needful and proper traffic arrangements with other roads for the exchange of business; and it was further thereby ordered that said receiver should, as soon as may be, make and file with the clerk of the court an inventory of all the real and personal property that came into his possession as receiver. The said defendant further gave evidence tending to show that said receiver, on the 19th day of June, 1882, took possession of said railroad in pursuance of said decree, and has exclusively held possession and operated and maintained said railroad until after the 19th day of February, 1885; that the inventory of property received by him, which was put in evidence, disclosed, among other things, a single track from Duke street in Alexandria to St. Asaph's Junction, and a double track from the said junction to the south end of the Long Bridge, with sidings, bridges, etc. The evidence further tended to show that said company had no cars, engines, or rolling stock when the receiver took possession, and that none was acquired afterwards; that the receiver made all his returns of money received to the said circuit court, and that such moneys were carried through certain arrangements existing with the Baltimore & Potomac Rail-

Liability of
company in
hands of
receiver.

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road Company, the Virginia Midland Railway Company, and with Du Barry and Green, trustees of the Alexandria & Fredericksburg Railway Company; that under this arrangement the gross receipts of the operation of the route between Alexandria and Washington went into the hands of J. S. Lieb, treasurer, and through a common auditor the net proceeds were distributed *pro rata*, and to the receiver was paid the *pro rata* share of the Alexandria & Washington road.

Thereupon the Alexandria & Washington Railroad Company moved the court to instruct the jury that said company was, upon the pleadings and evidence, entitled to a verdict in its verdict in its favor, and also moved the court to instruct the jury that if they were satisfied from the evidence that all the property of the Alexandria & Washington Railroad Company was, at the time of the accident, in the exclusive control of George C. Wilkins, the receiver thereof, appointed by the circuit court of the United States, the verdict must be in favor of the Alexandria & Washington Railroad Company.

Both these prayers for instructions were refused by the court, and the case was submitted to the jury, under instructions whose validity is brought before us by the bills of exception. The plaintiffs, to overcome this evidence on behalf of the Alexandria & Washington Railroad Company, put in evidence a report made to the board of public works of the state of Virginia, signed and sworn to by John S. Lieb, treasurer, and H. H. Carter, superintendent of the Alexandria & Washington Railroad Company, for the year 1885. In this report nothing is said about an existing receivership, and there are statements of expenses in repairing engines and tenders, and in paying conductors, engineers, and firemen. It was also shown that at a meeting of the board of directors of the Alexandria & Washington Railroad Company, held in Philadelphia on November 27, 1876, John S. Lieb was appointed agent to receive and receipt for moneys due or to become due the company for transportation of mail between Washington and Alexandria; and that the warrants on the United States treasury, in payment for carrying the mail between Alexandria and Washington for the quarter ending March 31, 1885, were made payable to the order of John S. Lieb, agent of the Alexandria and Washington Railroad Company. It was also made to appear, by the testimony of Wilkins, the receiver, that he did not make the arrangement by which the trains of

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the Virginia Midland Railway Company, of the Alexandria & Fredericksburg Railway Company, and of the Baltimore & Potomac Railroad Company ran over the road of the Alexandria & Washington Railroad Company, but that he found an arrangement under which this was done when he was appointed, and he permitted it to continue; that he sold no tickets over the Alexandria & Washington Railroad; that the Alexandria & Washington Railroad had no rolling stock or employes in his employment or control as receiver; that he did not know which of the said companies, the Alexandria & Fredericksburg, furnished the rolling stock and employes to run the local trains over the Alexandria & Washington Railroad while he was receiver.

Upon the issue thus formed by the pleadings and evidence, the court below instructed the jury as follows:

“The Alexandria & Washington Railroad Company makes the plea that it was not a common carrier on the road at the time and place of the accident in question, because, they say, the road between Alexandria and Washington was at the time under the control of a receiver theretofore duly appointed. It is not disputed that Mr. Wilkins had been appointed receiver and held his office at the time of the accident. The question now is whether he alone is liable for injuries received on the road by reason of negligence, or whether the Alexandria & Washington Railroad Company is not liable, notwithstanding the receivership.

“If you find from the evidence that the Alexandria and Washington Railroad Company was carrying the United States mail between Alexandria and Washington, and the plaintiffs were in charge thereof as postal clerks, duly commissioned and designated by the United States for that duty, and the Alexandria and Washington Railroad Company was paid by the United States by drafts payable to the order of the agent of that company appointed by its board of directors to receive the same, and that the freight and passenger trains which collided and caused the injury to the plaintiffs were running over said road under an arrangement made by the parties in control of said road prior to the appointment of the receiver of said road, and if, when the receiver was appointed, he continued in office as superintendent, general manager, and treasurer the same persons as had heretofore discharged the duties of these positions, and if the business of this railroad, so far as was

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known to the public, was continued in the same way, so far as the general public could know, as before, and was so conducted at the time of the accident, and the only substantial duty that the receiver discharged was to receive the net earnings of the road from the treasurer and to account therefor to the court by which he was appointed, then if you shall find that the Alexandria and Washington Railroad Company was guilty of negligence, from the evidence and under the instructions of the court, your verdict will be against it and for the plaintiffs.

“ But if you are satisfied that the business on the Alexandria and Washington Railroad, so far as the interests of the Alexandria and Washington Railroad Company were concerned, was conducted by the receiver, after his appointment, and to the time of the collision, in his own name, and in such manner that it could be generally known by the public that he, and not the company, conducted the business and controlled the road and its management, and that he did so to the entire exclusion of any control or participation by the Alexandria and Washington Railroad Company, its officers and board of directors, then your verdict should be for the Washington and Alexandria Railroad Company.”

We do not think that the court erred in admitting evidence tending to show that, practically, the road was managed and controlled by the agents and employés of the company, and that the receiver's functions were restricted to the receipt of its share of the net earnings, and, with such evidence before the jury, we do not perceive any substantial error in the instructions given to the jury. It could not be safely said that in no case evidence should be received to show that a receiver contented himself with receiving a share of the net earnings of a railroad which he permitted to be managed by the officers and employés of the company owning the road, in connection with those of other companies having a common interest.

A similar question was decided by this court in the case of Railroad Co. v. Brown, 17 Wall. 448. There a railroad was run on the joint account of lessees on the Virginia end of the road, and of the receiver on the end in the District. A suit was brought against the railroad company by a passenger, who recovered a verdict and judgment. It was urged in this court in pursuance of exceptions duly taken, that the railroad company was not liable for anything done while the road was

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operated by the lessees and the receiver, and it was said, through Mr. Justice DAVIS:

“ It is the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the state by a voluntary surrender of its road into the hands of lessees. The operation of the road by the lessees does not change the relations of the original company to the public. It is argued, however, that this rule is not applicable where the proceeding, instead of being voluntary, is compulsory, as in the case of the transfer of possession to a receiver by a decree of a court of competent jurisdiction. Whether this be so or not we are not called upon to decide, because it has never been held that the company is relieved from liability unless the possession of the receiver is exclusive, and the servants of the road wholly employed and controlled by him. In this case the possession was not exclusive, nor were the servants subject to the receiver's order alone. On the contrary, the road was run on the joint account of the lessees and the receiver, and the servants employed and controlled by them jointly. Both were, therefore, alike responsible for the act complained of, and, if so, the original company is also responsible, for the servants under such an employment, in legal contemplation, are as much the servants of the company as of the lessees and receiver.”

Nor is it apparent that, in the present case, it is at all important to the receiver or to the company whether the one or the other was made nominal defendant. Upon the theory of the plaintiff's case that there was a joint liability on the part of the companies defendant for losses incurred in the management of the road, it would seem to make no difference whether the share or proportion of the loss chargeable to the Alexandria & Washington Railroad is deducted by the common treasurer from the share of the net earnings coming to the receiver, as is now the case, or should be deducted by the latter as part of his expenses, as would have been the case if he, as receiver, had been sued, instead of the company.

A special plea was likewise filed by the Alexandria and Fredericksburg Railway Company, claiming immunity because their railroad was, at the time of the collision, in the possession and control of trustees.

Under this plea it was shown that the company on June 1,

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1836, executed a deed of trust to secure payment of the principal and interest of bonds to the amount of \$1,-
000,000, and that DuBarry and Green were trustees, under the provisions of said deed and of certain orders of the county court of Alexandria county, in the state of Virginia. There was also evidence given tending to show that the said trustees took possession of said road on December 6, 1872, and all of its property, and held, used, and operated the same up to and beyond the time of the said collision, and that at the time of said collision the said the Alexandria & Fredericksburg Railway Company had in its possession no cars, engines, or rolling stock, and that the trustees in possession under said deed of trust, as aforesaid, did, in January, 1875, appoint George C. Wilkins superintendent of said Alexandria & Fredericksburg Railway and property, and that said Wilkins had exclusive possession and management of the road.

Liability of
company in
hands of mort-
gage trustees.

On the part of the plaintiffs it was shown that the Alexandria & Fredericksburg Railway Company made a report to the board of public works of the state of Virginia for the year of 1885, sworn to by the president and general superintendent of the company, in which there is no reference to the alleged possession by trustees, but it does contain detailed statements of the property of the company, including cars and engines, and of the number of passengers and tons of freight carried, and of the various expenditures on account of repairs.

It was further shown that the engine that hauled the freight train that figured in the collision belonged to the Alexandria & Fredericksburg Railway Company.

The Alexandria & Fredericksburg Railway Company requested the court to charge the jury that if they should find that the property of the company was in the exclusive possession and control of the trustees, and that the company did not, by its servants, agents, or otherwise, exercise any authority or control over the road between St. Asaph's Junction and Alexandria, after the receiver of the Alexandria & Washington Railroad Company took possession of that line, the verdict must be for the Alexandria & Fredericksburg Railway Company.

The court instructed the jury as follows:

“The Alexandria and Fredericksburg Railway Company

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also pleads that it was not a common carrier on the road when the accident occurred, in addition to the plea of not guilty, and upon this trial it supports this plea by showing that its road, at the time of the accident and for some time before, had been in the possession of trustees, by virtue of the provisions of a deed of trust executed by the company to secure its indebtedness, the condition of which had been broken by the maturity and nonpayment of the debt so secured.

“In order that the Alexandria and Fredericksburg Company be acquitted from responsibility for this reason, it should, in any event, appear that, in fact, the business of management and operation of the road was conducted by the trustees to the entire exclusion of the company, its officers, and board of directors, and that this was so notoriously so that the fact may well be presumed to be known to the public. Besides, it should appear that the trustees were not appointed by the procuration or assent of the railroad company, for, if so, the trustees would be as much the agents of the company as of the grantees in the trust deed. The supreme court of appeals of the state of Virginia, in an action brought against the Alexandria and Fredericksburg Railway Company for personal injuries resulting from negligence on the road while in the possession of trustees by virtue of a deed of trust, under conditions precisely similar to those shown in this case, held that ‘no provision is found in the charter of the defendant company, or the general railroad law of Virginia, which will authorize the company to transfer to trustees or to mortgagees, under the deed of trust given as a mere incumbrance and security, the right and legal capacity to step into the shoes of the company, and assume and exercise indefinitely the franchises, rights, and privileges of the company, so as to give the company exemption and immunity from responsibility for all injuries inflicted by the operation of the road by trustees.’ I quote this language for convenience and accuracy, and adopt it, and give it to you as the law in this case. It follows that the Alexandria and Fredericksburg Company cannot be excused from liability because of any possession shown in trustees.”

An examination of the trust deed discloses a provision that the trustees, in case of default for a period of 90 days, and on the request in writing of the holders of the bonds, might take possession of the railroad and appoint agents to conduct

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its affairs; and it was claimed that the court might presume that the possession of the trustees, relied on to defeat the suit against the company, was in pursuance of that provision.

However this may be, we think that there was evidence which justified the court in submitting the question of the exclusive possession by the trustees to the jury, and that the instructions given were not erroneous in any substantial particular. The observations already made respecting the similar claim on behalf of the receiver of the Alexandria and Washington Railroad Company are applicable here, but need not be repeated.

Judgment of the general term of the supreme court of the District of Columbia reversed, and case remanded to that court with directions to set aside the judgment of the special term, and to permit the plaintiffs to elect to become nonsuit as against the Pennsylvania Railroad Company, and take judgment on the verdict against the other defendants, and, if they do not so elect, then to set aside the verdict, and order a new trial generally.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. CO.

v.

LOUISVILLE & NASHVILLE R. CO.

(Court of Appeals of Kentucky, March 15, 1895.)

Action by One Company Against Another to Recover Damages Paid by the Former and Alleged to have been Caused by Negligence of the Latter—Sufficiency of Petition—Allegation of Right of Passenger to Recover.—Where one railroad company has been compelled to pay damages to its passengers by reason of an injury to them because of the negligence of another railroad company, and seeks to recover such damages in an action, not only must it allege the neglect of the company sought to be charged, but it must further aver a state of facts showing the right of recovery by the passenger against the company seeking the indemnity. (Page 411.)

Same—Negligence of Defendant.—An allegation that the damages which plaintiff was compelled to pay, and did pay, were occasioned wholly by the negligence of the defendant is insufficient. (Page 412.)

APPEAL from Boyle county circuit court. *Affirmed.*

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C. B. Simrall, Edward Colston, George Hoadley, Jr., and J. W. Yerkees, for appellant.

H. W. Bruce, R. P. Jacobs, and John McCord, for appellee.

PRYOR, C. J.—This action was instituted in the Boyle circuit court by the Cincinnati, New Orleans & Texas Pacific Railway Company against the Louisville & Nashville Railroad Company, upon the following state of facts. The plaintiff, in operating its railroad extending from Cincinnati, Ohio, to Chattanooga, as a carrier of passengers and freight, had to cross certain railroad tracks of the defendant at Junction City, in the county of Boyle, and the manner as well as the time of crossing was known to the defendant or its agents in charge of the operation of its trains at that place.

That in November of the year 1890, with a passenger train of the plaintiff operated in the customary way, when crossing the defendant's track at Junction City, the defendant, through the gross negligence of its agents in charge of defendant's train on the road of defendant, caused the engine and train on defendant's road to run into the train of the plaintiff, and break and destroy its cars.

That at the time the plaintiff had in its cars numerous passengers (naming them), under a contract of safe carriage between certain terminal points on its road.

That passengers were in the car that was demolished, and each and all of them received severe bodily injuries by reason of the collision. And that, by reason of its obligation to carry them safely, the plaintiff became liable to and was compelled to pay, and did pay, to said persons so injured divers sums of money (naming the amounts), making in all the sum of \$2,827.67.

The plaintiff, after reciting these facts, the substance of which are given, made the following averments in its petition: "Plaintiff says that said injuries to said passengers for which it became liable, and for which plaintiff was compelled to pay, and did pay, said sums, were occasioned wholly by the negligence of the defendant in running its engine into plaintiff's train, and thereby injuring said passengers who were being carried on plaintiff's train in the way and manner stated. Plaintiff says the loss sustained by it in the payment of said

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sum of \$2,827.67 to said persons aforesaid was occasioned wholly by the negligence of the defendant in running its said engine into the train of this plaintiff as aforesaid, and in injuring the plaintiff's passengers as aforesaid."

Judgment is then asked for the amount paid in damages, etc.

A general demurrer was sustained to the petition, the court below holding that the facts alleged presented no cause of action.

The questions arising on the demurrer are interesting, as well as important, and; if the averments of the petition presented such facts as the argument of counsel for the appellant contends that this court must assume existed, there would be much reason for holding the appellant entitled to recover.

The claim of the appellant and its right of recovery are based solely upon the alleged negligence of the appellee, not for an injury to the property of the former, but for an injury to the person of its passengers, with whom the appellant had contracted to carry safely

Sufficiency of
petition.

from one point of its road to another. It was the duty of the appellant, as held by this court in the case of Louisville & N. R. Co. v. Ritter's Adm'r, 85 Ky. 368, to exercise the utmost degree of human care, diligence, and skill in order to carry its passengers safely; and, while recognizing this as the well-settled rule on the subject, the carrier is not an insurer of the life or person of the passenger, and can only be made liable on the ground that it has failed to exercise this extraordinary care and diligence for his safety. If, therefore, this is a case where the one company has been compelled to pay damages to its passenger by reason of an injury to him caused by the negligence of another company, and for that reason is seeking indemnity, the neglect of the company sought to be charged must not only be alleged, but the further averment of a state of facts showing the right of recovery by the passenger against the company seeking the indemnity; for, if no liability existed, a voluntary or coercive payment in settlement of the damage sustained will not authorize the assertion of such a claim.

The averment that the liability of the appellant and its being compelled to pay the money were caused wholly by the negligence of the defendant must be construed as meaning that the appellant was entirely blameless, and, being without fault,

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assumed the liability of the defendant to the passenger for no other reason than his being injured when in appellant's car; or if we must assume, as is contended should be done, that the language "wholly to blame" means the plaintiff was wholly to blame as between the plaintiff and the defendant, still there is no averment of any fact authorizing the conclusion that the appellant was guilty of any negligence, or of such negligence and want of care as would authorize a recovery by the passenger by reason of the appellant's failure to carry him safely to his destination.

There can be no doubt but that a recovery could be had by the appellant against the appellee if the injury to its car was the subject of the action, but for an injury to the passenger in its car caused by a stranger the appellant could not be held liable, unless it neglected to use that high degree of diligence required of the carrier for the safety of its passengers.

We are asked to infer from the statements contained in the petition, in order to make a cause of action—First, that the words "wholly to blame" apply alone as between the plaintiff and the defendant; and, secondly, to assume that some neglect or want of diligence must have been shown on the part of the plaintiff to authorize a recovery by the passenger or a satisfaction to him by the plaintiff of his demand for compensation. It is manifest that at such a crossing it was the duty of the appellant or those in charge of its train to use every precaution the highest degree of diligence could suggest in order to protect the passenger from danger, or from being injured by approaching trains on the defendant's line of railway. Still, we are not authorized to say, in the absence of any averment, that the appellant had failed to discharge its duty in this regard, or, if it failed to do so, the extent to which its neglect or want of diligence contributed to the injury.

If this court is required to assume that the appellant's want of care and diligence gave to the passenger a cause of action against it, for the same reason it might be said that, but for appellant's fault, the accident would not have happened, or that it was tortfeasor with the appellee. The appellant, recognizing its liability to the passenger by the payment of this money, and failing to allege facts showing that such a liability existed, must be regarded in no other light than as one having compensated the passengers for the wrong done them by the defendant, and now seeking to be substituted to

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their right as against the appellee. Where both parties are negligent, and the one to a less extent than the other, there might be cases in which the greater offender may be held liable by the lesser offender for damages incurred by the joint act. As to personal injuries where each wrongdoer is the active participant in the commission of the injury, but one to a less degree or extent than the other, we have been cited to no case where contribution can be had.

The cases cited, as well as the text-books, establish the rule that, where two or more persons unite and are guilty of a tort resulting in injury to another, for the injury or damage resulting from these joint or concurrent acts, if one is made liable he can have no claim for indemnity against the other; and, on the other hand, where one commits the tortious act, and another, by reason of his relation to the party committing it, is required to account in damages to the party injured, he may recover. *Gray v. Gaslight Co.*, 114 Mass. 149; *Lowell v. Railroad Co.*, 23 Pick. 24. It is under the latter rule that the appellant is asserting its claim, and it might be well founded if the negligent act of the appellee causing an injury to the passenger in appellant's car gave to the appellant a cause of action, as it did for the injury to its car.

The defendant (appellee) was liable to the passenger, and no liability existed on the part of the appellant unless it contributed to the injury, or, by reason of its own fault, the passenger was placed in danger; and if, in such a case, the one less in fault than the other can recover, the facts upon which the recovery is based must be stated. The class of cases in which wrongdoers are held as not being *in pari delicto* is where the one asking for indemnity was not an actual participant in the wrong, but by reason of the negligent act of some one acting under his authority the liability arises.

In the case of *Lowell v. Railroad Co.*, the railroad company was empowered to construct its road across the highway over which the city of Lowell had control, and, in excavating across the road, barriers were placed near the cut to protect travelers. The workman on one occasion neglected to put up the barriers, having taken them down to enable him to work. A traveler was injured, and the city of Lowell, being made liable, sought indemnity against the railway, and recovered. Illustrations of the rule and its application are also given in that case; as, if A, with a forged warrant, should arrest B,

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and command C, showing him the warrant, to confine B until he could carry him to prison, and C, being ignorant of the forgery, compel B, and is made liable, C may sue A for indemnity, although both are trespassers. They are not, however, *in pari delicto*; and in such cases the principal offender is held liable.

And so in this case the principal offender would be held liable, unless it appears the appellant's negligence at the time contributed to the injury. If so, this court would not measure the degree of neglect on the part of either with a view of giving indemnity. That the appellant was grossly negligent or slightly negligent will not be determined for the purpose of ascertaining whether there was a less degree of neglect on its part causing the injury than on the part of the appellee.

The judgment sustaining the demurrer is therefore affirmed.

ABSTRACTS OF RECENT DECISIONS

Release of Claim for Personal Injuries—Setting Aside Settlement for Improvidence.—Improvidence in settling a claim against a railroad company for personal injuries is not a ground for setting aside a release executed in pursuance thereof. *Barker v. Northern Pac. R. Co.*, (U. S. Cir. Ct. E. D. Mo. E. D.) 65 Fed. Rep. 460.

Same—Same—Offer to Return Consideration Received for Settlement.—To set aside a release of claims for personal injuries there should be an offer to return the consideration received therefor. *Barker v. Northern Pac. R. Co.*, (U. S. Cir. Ct. E. D. Mo. E. D.) 65 Fed. Rep. 460, *citing* *Vandervelden v. Railway Co.*, 61 Fed. 54; *Johnson v. Granite Co.*, 53 Fed. 569; *Gould v. Bank*, 86 N. Y. 75; *Cobb v. Hatfield*, 46 N. Y. 533; *Thayer v. Turner*, 8 Metc. (Mass.) 550; *Kimball v. Cunningham*, 4 Mass. 502; *Doane v. Lockwood*, 115 Ill. 490, 4 N. E. 500; *Railway Co. v. Hayes*, (Ga.) 10 S. E. 350; *Burton v. Stewart*, 3 Wend. 236; *Bain v. Wilson*, 1 J. J. Marsh. 202; *Jarrett v. Morton*, 44 Mo. 275; *Hart v. Handlin*, 43 Mo. 171; *Estes v. Reynolds*, 75 Mo. 563.

PHILLIPSBURG HORSE CAR CO.

v.

FIDELITY & CASUALTY CO.

(*Supreme Court of Pennsylvania March 19, 1894.*)

Indemnity to Street Railway Company on Account of Injury Resulting from Accident—Scope.—A policy of insurance indemnifying a horse-railway company for damages because of injuries to persons not employes resulting from "accident to or caused by the horses, cars, plants, ways, works, machinery, or appliances used in the business of the insured and described in the application," does not indemnify the company against injuries resulting from the use of omnibus sleighs which are not described in the application, although the use of such sleighs by such companies is customary in the locality when the tracks are obstructed by snow and ice. (*Page 417.*)

APPEAL from Northampton county court of common pleas.
Reversed.

W. S. Kirpatrick, for appellant.

H. J. Steele and *Russell C. Stewart*, for appellee.

FELL, J.—The policy of insurance upon which this action is founded was issued by the defendant to the Phillipsburg Horse Car Company, the plaintiff, upon an application in writing in which the insured set out the number of miles of road operated, the number of cars and horses in use, the number of trips per day, the schedule time, and other matters intended to give the fullest information to the insurer of the character and extent of the risk, and ended with the statement, "There is no information tending to vary the risk, except as herein stated."

Facts.

The insurance was "against all liability for damages for or on account of fatal or nonfatal injuries suffered by any person or persons, other than employes of the insured, resulting from any and every accident to, or caused by, the cars, horses, plants, ways, works, machinery, or appliances used in the business of the insured, and described in the application herefor, which is hereby made a part of the policy."

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The plaintiff owned three large omnibus sleighs, which were used in place of cars whenever the tracks were obstructed by snow or ice. During some winters they were used for a few days only, during others for weeks, and occasionally for months. They bore the name of the company, and were a part of its appliances for transportation. No mention of these was made in the application for insurance. The recovery against the car company was for injuries sustained by a passenger by the upsetting of one of these sleighs, and the only question we need now consider is whether the accident for which indemnity is claimed is within the terms of the contract.

The verdict could have been properly rendered, and can now be sustained, only upon the ground that the contract of insurance covered the use of other means of transportation than those mentioned in the application, and was against all risks incident to the general business of the company. The learned judge before whom the case was tried entertained this view, and, in a charge in which the merit of clear and distinct statement is conspicuous, instructed the jury that: "The words described in the application herefor, limiting the liability of the company, do not apply to the machinery, appliances, plant, horses, cars, etc., described in the application of insurance; but they apply to the business of the insured 'described in the application herefor,' and therefore mean more than accidents, etc., occurring by the use of the property which is described in the application."

This view was based upon the construction of the contract, and the fact, of which there was evidence, that sleighs were at times used by street-railway companies in conducting their business in the section of country in which the plaintiff's road was operated.

This view does not seem to us to be correct. The words of the policy limit the insurance to indemnity from liability for damages on account of injuries "resulting from any and every accident to, or caused by, the horses, cars, plants, ways, works, machinery, or appliances used in the business of the insured, and described in the application." The insurance is against accidents caused by certain things used in the business, and described in the application, not things used in the business which are not described in the application. There was

Scope of
indemnity
policy.

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testimony that for some years the car company had used sleighs when its tracks were obstructed by snow or ice, and that their use was customary under the same circumstances in neighboring towns; but it also appeared that the use of sleighs was restricted to that section of country, and that it was only one of the ways in common use of overcoming the difficulties caused by snow and ice. The testimony was far short of establishing a use so general that the parties would be presumed to have taken it into consideration in entering into a contract.

The plaintiff was incorporated as a horse-car company, and as such had constructed and was operating a street railway by horse power. The use of any other vehicle than a horse car was not authorized by its charter, and could be justified only as a means of overcoming a temporary interruption of its operation, resulting from an emergency. The policy, by its terms, was based upon statements made in the application, which were to be considered as warranties; and it was restricted to injuries caused by or to certain enumerated ways, means, and appliances used in the business, and described in the application. The defendants would not have been liable, under the terms of the policy, if the motive power had been changed by the use of steam or electricity, instead of horses; and we are not able to see that the result is different when one kind of vehicle is substituted for another.

This is not the case of the temporary use of another means of transportation upon a part of the line, made necessary by reason of the accidental destruction of cars, tracks, or bridges, nor of the use of plows or sweepers to clear the track; but it was an entire abandonment, during portions of the winter season, of the use of the road as a horse railroad, and the substitution of a distinct and different mode of transportation. Whether the risk would be increased or diminished would depend upon the circumstances of the particular case, but it is evident that the risk in the use of sleighs differs from the risk in the use of cars. It includes the danger of upsetting, the chances of collision with other vehicles, the liability to loss of control of the horses,—risks which are minimized in the use of street cars. The conditions from which accidents would probably result in the use of sleighs differ from those from which they are likely to happen in the use of cars; and,

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whether the difference is great or small, it is for the insurer to decide whether he will accept the risk.

We are therefore of opinion that the sixth point, asking for a peremptory instruction for the defendant, should have been affirmed; and, as this sustains the eighth assignment of error, it is unnecessary to notice the other assignments.

The judgment is reversed.

ABSTRACTS OF RECENT DECISIONS

A policy of insurance indemnifying a street railway company against all liabilities for damages on account of injuries resulting from, or caused by, the "horses, cars, ways, works, machinery or appliances used in the business of the insured and described in the application" does not insure against liability for injuries sustained by passengers by reason of the overturning of a sleigh which was substituted for the cars, where the ways, means, and appliances enumerated in the application did not include sleighs, and the testimony failed to establish such a general use of such vehicles at times when the operation of the cars was prevented by snow and ice as would raise a presumption that such a use was taken into consideration when the contract of insurance was entered into. *Phillipsburg Horse Car Co. v. Fidelity & Casualty Co., (Pa.) 28 Atl. Rep. 824.*

ATCHISON, TOPEKA & SANTA FÉ R. CO.

v.

HENRY (W. T.).

(Supreme Court of Kansas, Oct. 5, 1895.)

Liability of Company for Assault on Passenger by Employee [(1) p. 444].— The contract of a common carrier with a passenger requires the carrier to protect the passenger against interference or injury arising from the negligence or wilful misconduct of its servants while engaged in performing the duties which the carrier owes to the passenger; and where a passenger upon a railroad train is unjustifiably assaulted and beaten by an employé who owed him the duty of protection, the railroad company is responsible for his acts and liable for the injury suffered. (*Page 423.*)

Liability of Company for False Arrest and Imprisonment of Passenger.— A railroad company which is carrying passengers is liable for an illegal arrest and the false imprisonment of a passenger caused to be made by the conductor in charge of the train on which the passenger was riding, while acting in the line of his employment. (*Page 423.*)

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Excessive Verdict.—Three thousand dollars' damages for an assault upon and the false arrest and imprisonment of a passenger by the company's servants is not so excessive as to indicate passion or prejudice in the jury, or to justify the court in disturbing the verdict. (*Page 425*).

ERROR from Sumner county district court. *Affirmed.*

W. T. Henry brought an action against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for injuries sustained by him on account of the alleged wrongdoing of the company, and in his petition Case stated. alleged that on January 9, 1890, he boarded a train of the railroad company at Kansas City, Mo., for the purpose of riding over the Southern Kansas Division of that railroad to Wellington, Kan.; that he was provided with a ticket or stock contract entitling him to ride over the road between the points named; and that the conductor in charge of the train refused to accept his ticket or stock contract, and required him to pay in cash the sum of \$7.50 for his transportation to Wellington.

In the second count of his petition he alleges that, while he was riding as a passenger and deporting himself in a proper and orderly manner, the agents and servants of the Facts. company, in the pretended exercise of authority to preserve order on the train, wrongfully and wantonly assaulted him by striking him on the head and body several times, with great force and violence, with a heavy lantern, thereby causing him to suffer great injury in body and mind. In the third count it is alleged that, while he was conducting himself in a quiet and proper manner, the defendant, by its agents and servants, in the pretended exercise of authority, and to preserve order in and about the train at Ottawa, did arrest him, without any warrant or authority of law, and did forcibly remove him to the common jail of the county, where he was detained for twelve hours without any reasonable or probable cause, by reason of which he suffered great physical injuries, and that he was also greatly humiliated and injured in his circumstances and credit.

For all these things he prayed damages in the sum of \$10,000.

The answer of the defendant was a general denial.

Henry finally withdrew any claim for the amount he paid out for railroad fare from Kansas City to Wellington, and the

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case was finally submitted upon the claims in the second and third counts of the petition.

In answer to special interrogatories which were submitted, the following findings of fact were made:

“(1) On what train of cars did plaintiff take passage from Kansas City, Mo., on the 9th day of January, 1890, and over what road did the same run? Ans. On Santa Fé train, on Santa Fé road, Southern Kansas Division.

“(2) In what car in said train did plaintiff first take passage? Ans. Smoking car.

“(3) How long did he remain in such car in interrogatory No. 2 mentioned before going into the ladies' car? Ans. A very short time; say, a few minutes.

“(4) Did plaintiff go to sleep soon after taking a seat in the ladies' car? Ans. He did.

“(5) If you answer interrogatory No. 4 'Yes,' state whether he remained asleep until the conductor waked him up to collect his fare? Ans. According to evidence, yes.

“(6) How many times did the conductor wake the conductor wake the plaintiff up, and state to him in regard to producing his ticket or paying his fare, before plaintiff paid the same? Ans. Either two or three times; asked him for ticket three times.

“(7) What was the name of the conductor on the train January 9, 1890? Ans. Eli Parsons.

“(8) Upon the payment of plaintiff's fare, did the conductor give him a receipt therefor? Ans. Yes.

“(9) Was not the plaintiff under the influence of intoxicating liquors when he entered the train at Kansas City? Ans. To a certain extent, yes.

“(10) After plaintiff had paid his fare, did he not, at several times thereafter, use profane and vulgar language while in the 'ladies' car? Ans. The evidence on this question is contradictory. We think, however, that he used profane words a few times.

“(11) If you answer interrogatory No. 10, 'Yes,' then please state whether or not there were any ladies present in the car at the time. Ans. Yes.

“(12) Is it not a fact that, while in the ladies' car, the plaintiff made threats of doing the conductor personal injury and violence? Ans. The preponderance of evidence is, we think, against such a conclusion.

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“(13) If you answer interrogatory No. 12, ‘Yes,’ please state if such threats were communicated to the conductor by any of the passengers in said car. Ans. * * *

“(14) Was not the plaintiff drunk and boisterous while in the ladies’ car on said train? Ans. No.

“(15) Is it not a fact that the conductor removed the plaintiff from the ladies’ car to the smoker on account of his being drunk and disorderly? Ans. No.

“(18) While in the smoking car, did not the plaintiff have an open knife in his hands, and was not such a knife and the blade thereof long and thin? Ans. Yes.

“(19) Did not the plaintiff while in the smoking car threaten to do the conductor personal violence and injury? Ans. No; we think not.”

“(21) When the conductor and brakeman came into the smoking car, did the plaintiff have the knife above referred to in his hands, and was the same open? Ans. Yes.

“(22) Did not some of the passengers in the smoking car, when the conductor and brakeman came in, say, ‘Look out! he [meaning the plaintiff] has got a knife’? Ans. Yes.

“(23) Did not the brakeman order the plaintiff to drop the knife before striking him with the lantern? Ans. Yes.

“(24) How many times did the brakeman order the plaintiff to drop the knife? Ans. Once.

“(25) How many times did the brakeman strike the plaintiff with a lantern? Ans. Three times.

“(26) Did not the brakeman, after striking the plaintiff with the lantern the last time, say to him, ‘If you make such a pass at me again, you will be carried out of this car a corpse,’ or words to that effect? Ans. Yes.

“(27) During all the time the plaintiff was on the train of cars, what was the treatment and demeanor of the conductor to him? Ans. His treatment of and demeanor toward the plaintiff was good, with the exception of his action in causing the arrest of said plaintiff.”

The jury returned a general verdict in favor of Henry, and assessing damages against the railroad company at \$3000.

Motions to set aside the verdict and for a new trial were overruled, and judgment was awarded for the amount named in the verdict.

The railroad company alleges error.

Injury by Employees

A. T. & S. F. R. Co. v. Henry

A. A. Hurd, W. Littlefield, and O. J. Wood for plaintiff in error.

J. E. Halsell for defendant in error.

JOHNSTON, J. (after the foregoing statement).—At the trial the plaintiff below, W. T. Henry, relied upon two grounds of recovery: One for the alleged assault made upon him by the brakeman, while Henry was a passenger on the train of the railroad company, and the other for the unlawful arrest alleged to have been made at the instance of the railroad company while he was a passenger upon the train, and his illegal imprisonment for about 12 hours in the jail of Franklin county.

Additional
statement.

Henry was a farmer and stock shipper, who made a shipment of cattle from Wellington to Kansas City in January, 1890, and who, in consideration of the shipment, received a ticket or stock pass entitling him not only to accompany the cattle to Kansas City, but to a return passage from that place to Wellington. On the return trip he was unable to find his stock pass, and was required by the conductor to pay a cash fare. Some difficulty arose between him and the conductor concerning the collection of the fare, in which it was contended by the employes of the company that Henry became profane, violent, and abusive, and threatened violence to the conductor. It is claimed that the threats were communicated to the conductor, who, when passing through the train, accompanied by a brakeman, found Henry with an open knife in his hand in a threatening attitude; that the brakeman approached him, and demanded that he should throw the knife down, but Henry refused, when the brakeman struck him three times upon the head with a lantern.

The theory of the railroad company was that Henry was drunk, abusive, and violent; that he had become enraged because of the collection of his fare, and had threatened the lives of the employes of the company; and that, with an open knife, he was endeavoring to carry out his threats at the time he was attacked by the brakeman; and that, therefore, the conductor and brakeman were justified in committing the assault upon Henry and inflicting upon him the punishment which they did.

On the other hand, Henry claims that he was not drunk or disorderly; that while he complained of the collection of

A. T. & S. F. R. Co. v. Henry Injury by Employee

his fare, and the failure to return it after his stock pass had been found, he made no threats against the conductor, nor any attempt to attack him with a knife or in any other manner. He claimed that he was using his knife to cut a chew from a plug of tobacco which he held in his hand.

The jury have specially found, upon conflicting evidence, that, while Henry used some profane language on the train, he was not drunk or boisterous; that he made no threats of doing personal injury or violence to the conductor upon either of the cars on which he rode. There was a further finding that the brakeman struck Henry twice after he had dropped the knife.

According to the testimony which was accepted by the jury, the action of the brakeman in assaulting Henry was a gross violation of the duty of the railroad company towards a passenger. As the relation of carrier and passenger existed, he was entitled to the highest degree of care and protection against violence or interference by others so long as he conducted himself in a proper manner. If, through the negligence of the company in affording him the care and protection to which he was entitled, the passenger had suffered an injury, the company would be liable; and certainly the liability is no less where the injury is intentionally inflicted by an employé of the company who was required to exercise care and protection towards the passenger.

Liability of
company for
assault on
passenger by
employee.

It is true, if Henry was drunk and disorderly, and his conduct such as to render his presence offensive or dangerous, they would have been justified in excluding him from the train; and it is also true, as contended by the company, that the brakeman and conductor might repress acts of violence on his part, and under certain circumstances defend themselves or repel a threatened attack. The finding of the jury, however, makes the brakeman the aggressor, and his attack upon the passenger unjustifiable. *Stewart v. Railroad Co.*, 90 N. Y. 588; *Ray*, Neg. Imp. Dut. §§ 106, 107.

It is next contended that the company is not liable for the illegal arrest and false imprisonment of Henry. The arrest was made without a warrant, and the imprisonment continued for about 12 hours in the county jail of Franklin County. It occurred about one half an hour after the termination of the difficulty on the train, at a time when Henry was quiet and orderly.

Liability for
false arrest.

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When the train reached Ottawa, the conductor reported the occurrence of the difficulty to the superintendent, who advised that Henry should be taken from the train. The conductor inquired for an officer, and, when one was found, they went together into the train, where the conductor pointed out Henry, who was at once arrested by the officer, and taken to prison. Under these circumstances, there can be but little doubt that the conductor procured the false arrest to be made while in the line of his employment, and at a time when the relation of passenger and carrier existed between the company and Henry.

It is well settled that when one in charge of a train, and engaged in the business which has been entrusted to him by the company, causes the arrest of a passenger, the company for which he is acting cannot escape liability. According to the testimony which the jury believe, Henry was arrested at midnight, when he was quietly seated in a car; and, without process or any information as to the cause of his arrest, he was hurried from the train, and placed in jail, where he was searched, and shut up until about noon the next day. The action of the conductor, who must be held to have been acting for the company, was clearly a breach of the contract between the carrier and the passenger, which required that Henry should be carried in safety to his destination, and protected from interference by strangers or against the misconduct of the company's servants. Where the relation of carrier and passenger exists, it is held that no matter what the motive is which causes a servant of the carrier to commit an unlawful act, or to wrongfully inflict an injury upon a passenger, the carrier is responsible for the act and its natural and legitimate consequences. *Dwinelle v. Railroad Co.*, 120 N. Y. 122; *Hamel v. Ferry Co.* (Sup.) 6 N. Y. Supp. 102; *Palmeri v. Railroad Co.* (N. Y.) 30 N. E. 1001; *Gillingham v. Railroad Co.*, 35 W. Va. 588, Ray, Neg. Imp. Dut. § 109.

There is some testimony tending to show that the officer who made the arrest was employed by and received compensation from the railroad company. Some testimony of an objectionable nature in regard to his authority, as well as in regard to the authority of the superintendent, was received; but in view of the conclusion that has been reached, that the conductor, acting in the line of his employment,

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Injury by Employee

caused the arrest to be made, the objectionable testimony with respect to the authority of the police officer and of the superintendent becomes immaterial.

The final complaint is that the damages awarded by the jury are excessive, but the view which the jury has taken of the facts would justify the allowance of punitive damages against the company, and, looking at all the circumstances of the case, we cannot say that the award of \$3,000 is so excessive as to indicate passion or prejudice in the jury, or justify the court in disturbing the verdict.

Excessive
damages.

The judgment of the district court will be affirmed.
All the justices concurring.

LAMPKIN (Lyman)

v.

LOUISVILLE & NASHVILLE R. CO.

(*Supreme Court of Alabama, April 11, 1895.*)

Liability of Company for Assault on Passenger by Employee [(1) p. 444].—A railroad company is liable to a passenger for injuries sustained by reason of an assault committed upon him by a brakeman in its employ. (*Page 427.*)

Sufficiency of Complaint by Passenger for Injuries Inflicted by Employee of Company.—A complaint by a passenger against a railroad company to recover for personal injuries alleged to have been sustained by the tortious acts of an employé of the defendant which alleges that while he, plaintiff, was on board a regular passenger train, having paid the full fare demanded, one —, a brakeman or flagman or employé of defendant, cursed and otherwise abused him, and that when he was leaving the train at his destination such employé assaulted and beat him, sufficiently charges that the acts complained of were committed against the plaintiff while he was a passenger, by a brakeman in the service and employment of the defendant, while in the discharge of his duties as such. (*Page 428.*)

Sufficiency of Caption of Minute Entry of Judgment—Designation of Railroad Company by Initials—Although the caption of the minute entry of a judgment may be irregular because designating the defendant railroad company by initials, yet if the summons, complaint, and all other papers in the cause set out the name of the defendant in full, and sufficiently indicate to whom the initials referred, objection to the irregularity is without force. (*Page 428.*)

APPEAL from Decatur city court. *Reversed.*

Injury by Employees

Lampkin v. L. & N. R. Co.

This was an action of tort brought by the appellant, Lyman Lampkin, against the appellee, the Louisville & Nashville Railroad Company, to recover damages for an alleged breach of duty to plaintiff by reason of an alleged assault committed upon plaintiff by one of the defendant's brakemen, while the plaintiff was a passenger upon one of defendant's passenger trains.

Case stated.

The complaint, after alleging that the defendant was a railroad corporation, engaged in the business of the carriage of passengers for hire, continued as follows: "Plaintiff avers that on, to wit, the 9th day of June, 1890, he boarded defendant's regular passenger train (the same being used by defendant for the carriage and transportation of passengers) at Athens, Alabama, and paid defendant's agent, the conductor of said train, full fare for a first-class passage to Decatur, Alabama; that while *en route*, and on the way to Decatur, one —, who was a brakeman or flagman on defendant's train, and an employé of defendant, used vile and insulting language to plaintiff, calling him opprobrious names, improper, indecent, vulgar, and obscene language, threatening at the same time bodily hurt to plaintiff; that upon the arrival of defendant's train at Decatur, Alabama, and while plaintiff was in the act of getting off of defendant's train, said — (whose name is to the plaintiff unknown), employé of defendant, as aforesaid, wrongfully did assault and beat plaintiff, by striking him over the head, knocking him off of defendant's car, and wounding plaintiff by cutting great gashes in his head, from which the blood flowed profusely, at the same time cursing plaintiff in the most profane language."

The defendant demurred to this complaint on the grounds: (1) It does not give the name of the person whom it alleges was in the employ of the defendant, and who committed the act complained of.

(2) It is repugnant, in that it alleges that said person was a flagman or brakeman, without showing which, or the nature of his employment.

(3) The complaint does not allege that the injury complained of was done by said person in the line of his employment as a servant of this defendant.

(4) Said complaint does not allege that the act complained

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of was done in the execution of the business of this defendant.

(5) It is not alleged in the complaint that the acts complained of were done in execution of orders given by the defendant.

Upon the submission of the cause, upon these demurrers, the court sustained them, and the plaintiff declining to amend his complaint, the cause was dismissed.

In the minute entry of the judgment, the title of the case was written as follows: "Lyman Lampkin v. L. & N. R. R. Co." The plaintiff appeals, and assigns as error the judgment sustaining the demurrer of the defendant, and dismissing the plaintiff's cause.

O. Kyle, for appellant.

Harris & Eyster, for appellee.

HARALSON, J.—In *Goddard v. Railroad Co.*, 57 Me. 202, in discussing the question now before us, the court says: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. * * * He must not only protect his passengers against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of his own servants." To the same effect is the case of *Railroad Co. v. Flexman*, 103 Ill. 546, in which it is held that a contract exists between a common carrier and its passengers to use all reasonable exertion to protect its passengers from insult or injury from fellow-passengers, and which is, also, a guaranty on behalf of the carrier that it will protect them against personal injury and insult from the agents in charge of the train. Any other rule, it is there well said, would place the traveling public at the mercy of any reckless employé a railroad company might see fit to employ, greatly impairing the personal security of the passenger. *Bryant v. Rich*, 106 Mass. 180; *Craker v. Railroad Co.*, 36 Wis. 657, *McKinley v. Railroad Co.*, 44 Iowa 314; *Sherley v. Billings*, 8 Bush 147; *Railroad Co. v. Burke*, 53 Miss. 200.

The same question has been well considered in this state, and it may be regarded as settled, generally, as declared

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above. And the line has, also, been carefully and distinctly drawn, between such acts as are here complained of, when committed by an agent of the railroad, while acting in the line and discharge of his duty, and when committed by him as an individual, and not connected with his service to his company. Railroad Co. v. Whitman, 79 Ala. 328; Lilley v. Fletcher, 81 Ala. 234, 1 South. 273; Railroad Co. v. Frazier, 93 Ala. 45; Railroad Co. v. Seales, 100 Ala. 368; Collins v. Railroad Co., (Ala.) 16 South. 142; Gilliam v. Railroad Co., 70 Ala. 269; and authorities cited in these cases.

It sufficiently appears from the complaint that the acts charged were committed on and to the plaintiff, while he was a passenger on the defendant's train, by a brakeman in the service and employment of the defendant, while in the discharge of his duties as such, when he owed and could not deny protection to the plaintiff, and could not wilfully insult and maltreat him in the manner alleged.

The demurrer to the complaint was improperly sustained.

There was nothing in the objection that in the caption of the minute entry of the judgment the clerk employed the initial letters, "L. & N. R. R. Co.," for the corporate name of the defendant, and that said entry will not, for that reason, support this appeal against the defendant company. In the summons and complaint and all other papers in the cause the corporate name of the defendant is set out in full. These, when referred to, show plainly enough who the defendant is, as indicated by these initial letters. It was an irregularity, however, which should be avoided in such proceedings. Bolling v. Speller, 96 Ala. 270 Blackman v. Hardware Co., (Ala.) 17 South. —.

Reversed and remanded to the circuit court of Morgan county, the city court of Decatur having been abolished.

BRICKELL, C.J., not sitting.

Sharer v. Paxson

Injury by Employee

SHARER (Mary)

v.

PAXSON (Edward M.) *et al.*, Receivers of the Philadelphia & Reading R. Co.

(*Supreme Court of Pennsylvania, Oct. 7, 1895.*)

Injury to Passenger Pushed off Moving Car by Employee [(1) p. 444]—Conclusiveness of Finding of Jury.—A finding by the jury upon conflicting evidence that plaintiff's intestate, while attempting to board a moving car, and while standing on the step thereof, with a firm hold on each side rail, had his hold broken by an employé of the company, who pushed him off the car, whereby he received the injuries which resulted in his death, will not be disturbed on appeal. (*Page 430.*)

Same—Contributory Negligence [(1) p. 293] as Relieving Company from Consequences of Tortious Act of Employee.—The negligence of the deceased in attempting to get on the moving car cannot relieve the company from responsibility for the consequences of the wrongful act of the employé in pushing the deceased from the car after he had succeeded in getting on. (*Page 430.*)

Admissibility in Evidence of Railroad Ticket Found in Pocket of Deceased.—A ticket entitling deceased to passage on the train from which he was pushed off, which was found in his pocket after his removal to the hospital, was admissible in evidence, although it was not shown that the ticket was purchased or owned by him at the time of the accident, or that pursuant to it he was attempting to get on the train. (*Page 431.*)

Cure of Erroneous Admission of Declarations of Deceased.—Error in admitting declarations of the deceased was cured by the withdrawal of the evidence in relation to it and an instruction to the jury to disregard it. (*Page 431.*)

APPEAL from Lycoming county common pleas. *Affirmed.*

The fourth specification of error was as follows: "The court erred in overruling the objection of the defendants' counsel to the admission in evidence of the ticket found by the witness Harry Sweet in the vest pocket of Ellet Sharer, the deceased, after his removal to the hospital, which objection, and the ruling of the court thereon, is as follows: 'Philadelphia & Reading Railroad ticket, Williamsport to Newberry, shown witness (Harry Sweet). Q. Do you recognize that ticket? A. Yes, sir. Q. Where did you get it? A. From his vest pocket. It laid on the floor. By the Court: Sharer's vest

Specification
of error.

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Sharer v. Paxson

pocket? A. Yes, sir. By Mr. McCormick: We offer this ticket in evidence. By Mr. Reading: The offer is objected to—First, because it is not shown that the ticket was purchased or owned by Ellet Sharer at the time of the accident, nor that it was pursuant to it that he was attempting to get upon the train; second, because irrelevant and immaterial. By the Court: We will admit it and seal a bill for defendants.'"

John G. Reading, Jr., for appellants.

J. C. Hill, Henry C. McCormick, and *Seth T. McCormick*, for appellee.

MCCOLLUM, J.—The jury found that the plaintiff's husband was standing upon the step of the car, with a firm hold on each side rail, and that while in this position the company's servant broke his hold on the rails, and pushed him from the step, and that in consequence of this action of the servant he received the injury which resulted in his death. The evidence was sufficient to warrant the finding, and the instructions in regard to it were clear and impartial.

The testimony of R. C. English was direct and positive, and it was corroborated by the testimony of Ellis Shaffer. True, it was contradicted by a number of witnesses called by the company, but, if the facts involved in the finding were material, they were for the jury upon the whole testimony in relation to the occurrence.

It is contended, however, that, inasmuch as the deceased reached the position from which he was pushed while the train was moving, his own negligence contributed to his death, and is a bar to this action. The attempt to board

Effect of contributory negligence on company's liability.

a moving train is undoubtedly a negligent and hazardous act, but if it is successful, and the negligent party gets safely upon the car, it will not justify or excuse the subsequent negligence of the company or its servants by which he is injured. The rights of Sharer in the position from which he was thrown were the same as if he had taken it before the train started, or as the rights of a passenger who, while the train is moving, leaves his seat in the body of the car, and stands on the platform of it. He was on the car when the negligence of the company intervened and hurled him from it. His presence there was not the proximate cause of his death. The peril involved in get-

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ting there was passed, and the negligence or misconduct of which he was the victim was not included in the risks to which his position exposed him. *Railway Co. v. Boudrou*, 92 Pa. St. 475. If he had been thrown from the car by an ordinary jolt of it, as was the plaintiff in *Railroad Co. v. Hoo-sey*, 99 Pa. St. 492, he might have been considered as having voluntarily exposed himself to or assumed a risk incident to his position, and thereby caused or contributed to the injury he received. But he had no reason to anticipate the act which caused his death, and to push him from the step under the circumstances established by the verdict was as great an outrage as to push from the platform while the train is moving any passenger who may be found standing upon it.

The negligence of the deceased in attempting to get on the moving car cannot relieve the company from responsibility for the consequences of the negligent act committed by its employé after the former accomplished his purpose. He was lawfully upon the steps of the car, and entitled to the rights of a passenger in it. This sufficiently appeared by the ticket in his possession. The risk he ran in getting there was no abridgment of his right to pass from the step to the platform and thence to a seat in the car.

The company's principal contention is that under all the evidence in the case the court should have directed the jury to find for the defendant, and we are clearly of opinion that it cannot be sustained. We discover no error in the instructions or in the ruling complained of in the fourth specification.

Admissibility
of railroad
ticket in
evidence.

If there was error in the admission of the declaration of the deceased, it was cured by the withdrawal of the evidence in relation to it, and the instruction to the jury to disregard it. The specifications are overruled.

Erroneous
admission of
declaration of
deceased.

Judgment affirmed.

Injury by Employee

Krantz v. Rio Grande W. R. Co.

KRANTZ (Joseph)

v.

RIO GRANDE WESTERN R. CO.

(Supreme Court of Utah, August 31, 1895.)

Liability of Company for Tortious Acts of Employee [(1) p. 444] Termination of Relation of Carrier and Passenger.—Plaintiff, an itinerant merchant, having left a train at his destination, in a sparsely settled country, walked towards the section house to dispose of his wares, and was assaulted by defendant's section foreman, and driven back to the station, from whence he was ejected by the foreman and threatened with death if he did not leave, all of which was witnessed by the station agent. *Held*, that the company was not liable for the tortious acts of the foreman, since at the time of their commission the relation of carrier and passenger did not exist. *(Page 435.)*

Same—Failure of Station Agent to Protect Person in Station—Liability of Company.—After these assaults, plaintiff, in fear of the threat, left the station and started to walk on the track, but was overtaken by two persons who assaulted and robbed him, after which he returned to the station, and while talking to the agent, was again brutally assaulted by the foremen and the two persons who had robbed him, the agent being there present but refusing to assist him beyond ordering all the persons from the station, and plaintiff after again being driven out was obliged to walk 40 miles to another station. *Held*, that it was the duty of the station agent to have protected plaintiff, and that for his failure to do so the company was liable. *(Page 435.)*

Excessive Damages.—Four thousand dollars is not excessive damages in such a case. *(Page 437.)*

Reversal of Order for New Trial—Judgment Absolute by Appellate Court.—Where on appeal from a motion granting a new trial, the order is reversed, if there is no reason for remanding the cause for a new trial, the appellate court will affirm the judgment originally rendered. *(Page 437.)*

APPEAL from district court, Third district. *Reversed in part and affirmed in part.*

E. W. Taylor and C. S. Varian, for appellant.
Bennett, Marshall & Bradley, for respondent.

SMITH, J.—In this cause, appellant, the plaintiff below, brought suit to recover damages on account of alleged personal injuries inflicted by the respondent's servants.

Krantz v. Rio Grande W. R. Co. Injury by Employees

There are two counts in the complaint, and upon the trial a verdict was directed for the respondent, the defendant below, upon the first count, and a verdict returned in favor of the appellant, plaintiff below, in the sum of \$4000 upon the second count. Case stated.

The record discloses the following facts: Upon the 18th of July, 1892, appellant boarded one of the passenger trains of respondent at the station of Sunnyside, in this territory, and paid his fare to the next station, Lower Crossing, where he alighted from the train. Appellant was 51 years of age, and a travelling merchant by occupation, at the time engaged in travelling over the country selling spectacles. Facts.

Lower Crossing is simply a station on the line of railway, and its station house, together with the pump house and section house, were embraced, practically, within one inclosure. There was a platform extending from the station house to the section house, which was but a few yards distant. In alighting from the train, in pursuit of his business, plaintiff went towards the section house, for the purpose, as he says, to sell his wares. Before he reached the house, the section foreman, then in the employment of the company, who, it appears, was under the impression that the appellant was a spotter and spy of the respondent company, without provocation or words, assaulted him with a shovel, and drove him back to the station house, following him. The foreman pulled him out of the station house, and ordered him to leave, saying that he would give him five minutes to get away, and threatening him with death unless he obeyed. The ticket agent was present, and saw the foreman assaulting the appellant outside the station house, and saw them back into the waiting room.

Plaintiff, fearing further bodily injury, or worse, started to walk on the track away from the station, and towards Grand Junction, some 30 miles away. He was followed by two unknown persons, designated in the testimony as "tramps," who assaulted and robbed him after he had proceeded about a quarter of a mile upon his journey, taking his satchel, containing his stock in trade, together with his pocketbook, containing a few dollars in money. Thereupon he returned to the station house. The persons who robbed him returned also, and, it appears, located themselves at or near the pump

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house, which was opposite and across the tracks from the station house.

Upon his return he entered the station and made complaint to the ticket agent of what had happened, and was talking with him about sending telegrams to Green River station, giving information of the robbery. The section foreman interfered, and directed the ticket agent not to send the telegrams, and immediately after crossed the track to where the two tramps were standing, when all three came over to the station, the foreman in advance, and, entering the waiting room, the three assaulted the appellant, brutally beating him. Appellant appealed to the agent and the bystanders for assistance, which was finally rendered by a stranger, the ticket agent making no effort to protect him, other than, as he says, to order them all out of the waiting room. He testifies that he knew the section foreman, for some reason or other, was bent upon injuring the appellant, and that he did not interfere to protect him because he was sick; that he would have had to fight to protect him; that the foreman was subject to his orders in the station house, but would not mind him, because they were at outs; that his authority as station agent would not have been sufficient to protect appellant. Appellant was driven from the station, and walked all night to Price station, a distance of 40 miles, in his sick and disabled condition, where he received attention. The injuries he received were severe and permanent in their nature.

Facts continued. The first count in the complaint charges the respondent company with damages for the first assault upon the appellant by the foreman outside of the station house.

The second count charges the company for the assault and beating of the appellant by the foreman and two tramps in the waiting room after he had been robbed.

The district judge charged the jury that, in order to find for the plaintiff upon the second count, they must find "that this man was absolutely passenger of the defendant company; that the relation of passenger and carrier existed between them at the time of the assault. There is a correlative duty existing on both the passenger and carrier: the passenger to pay, or offer to pay, his fare; if it is accepted, he then becomes a passenger; then the duty of the railroad company is to protect, by all means within their power, during his

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transportation, and while he remains in the station house in that character, awaiting the coming of a train, or the departure of a train, as the case may be. That relationship existing, it was the duty of the railroad company to protect him from assaults, not only from its own agents and servants, but from other persons, if within their power; more especially from their servants and agents. That correlative duty was imposed on the railroad company if you find, I say, gentlemen, that he was a passenger at that time; and, to become a passenger, he must have paid his fare, or have offered and tendered to pay his fare."

A new trial was granted upon the second count, and the plaintiff appeals from the judgment against him on the first count, and from the order granting a new trial.

We are of the opinion that when the plaintiff alighted from the train at Lower Cressing, and made his way towards the section house, for the purpose of engaging in his regular business, his relation as passenger to the respondent company had ceased, and that it no longer owed to him any duty as a passenger; that the acts of the section foreman were not within the scope of his duties or employment, and, not being suffered or permitted by the respondent company, the appellant cannot recover from the company. We do not think that the general rule which permits a passenger a reasonable time in which to depart from the company's premises after alighting from his train has any application, and therefore affirm the judgment upon this appeal upon the second count.

In support of the order granting a new trial, it is urged by respondent's counsel that a motion for a new trial is addressed to the discretion of the trial court, and that in some particulars, the evidence being conflicting, that court should not disturb the order.

It is further claimed that, in order to entitle appellant to the protection of the respondent company, he must not only have intended to become a passenger, but must also have announced such intention, and his proposition must have been accepted by or on behalf of the company. This view was adopted by the trial court, and the case submitted to the jury upon this theory, and this alone. It is quite evident from the entire record that the new trial was granted because, in the opinion of the trial

Liability of
company for
tortious acts
of employe—
Termination
of relation of
carrier and
passenger.

Same—Failure
of station agent
to protect per-
son in station—
Liability of
company.

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judge, the appellant was not a passenger or intending passenger within the rule declared in its charge. In other words, the new trial was granted because, in the opinion of the court, the verdict was contrary to the law, and not because of any conflict in the evidence.

In the view we take, we are of the opinion that it is unnecessary to determine here when or how the relation of passenger begins. We think the case turns upon another rule of law. It appears from the record that the section house was situated in a desert country, sparsely settled, and with habitations few and far between; that the only method of transportation to and from Lower Crossing was by rail, and the station house was kept open for the reception of the public at large, as well as passengers, ordinarily, during all hours of the day. It is a matter of common knowledge, of which the court may take notice, that these railroad station houses scattered along the line of railroads in a sparsely-settled country, such as the locality here is proven to be, are thrown open for the use of the public, which, by invitation of the company, is permitted to use them at all times, before and after the arrival and departure of trains; that there was and is an implied invitation to all persons intending to avail themselves of the railroad service to enter and occupy the premises, and at any time, in the absence of reasonable regulations to the contrary, made by the company. And the offer to pay fare, or the announcement of the intention to pay fare, and the acceptance by or on behalf of the company, is not necessary to be made, by a person entering the station with such or other legitimate purpose, to entitle him to protection against violence by the company's servants.

This case does not even depend upon this question. When the appellant was assaulted and beaten in the waiting room of the station, the company itself was present in the person of the ticket agent in charge, who was its vice-principal, and the injuries inflicted upon the appellant by one servant of a company, aided by strangers, in the presence of and under the very eye of the vice principal, who tamely acquiesced, and failed to exercise his authority for the protection of the appellant, were inflicted by the company itself. The agent should have protected appellant, or, at least, should have made an earnest effort to do so. *Railway Co. v. Hinds*, 53 Pa. St. 512 *Railroad Co. v. Burke* 53 Miss. 227.

Krantz v. Rio Grande W. R. Co. Injury by Employees

We are not prepared to sanction the proposition that a man in the situation of the appellant, driven by the unprovoked and brutal violence of the company's own servants to seek the protection of its station house and waiting room in charge of its agent, has no recourse against the company for the wilful and malicious acts of its employes, under circumstances which make them the acts of the company. We think such contention is not only against public policy, but the settled rules of law.

Upon the evidence, then, the verdict was clearly right, and, in our judgment, the amount was not excessive. **Excessive damages.** The district judge erred in his construction of the law, and the case was submitted to the jury upon a wrong theory.

We are of the opinion from this record that the appellant is entitled to recover from the railroad company, and are not disposed, and do not find it necessary, to put him to the expense and trouble of a new trial. "Why should a verdict be set aside which is correct, because erroneous principles of law have been announced by the court? The object of a jury trial being to do justice between the parties, the annulment of the verdict, where this has been accomplished, on account of mistakes and misdirections on the part of the court, would seem akin to the criticism which censured a celebrated commander because he persisted in winning victories in violation of the rule of strategy." Railroad Co. v. Burke, 53 Miss. 227. **Judgment absolute by appellate court.**

The judgment upon the verdict as to the first count is affirmed, and the order granting a new trial as to the second count is reversed, and the original judgment upon the verdict reinstated as of April 28, 1894, the date of the original entry.

As the two appeals were submitted upon practically one record, and briefed together, the costs of printing briefs and record will be taxed in the respective appeals as apportioned by the clerk.

BARTCH and KING, JJ., concur in the judgment.

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LOUISVILLE & NASHVILLE R. CO.

v.

MCEWAN (Christine).

(*Court of Appeals of Kentucky, May 31, 1895.*)

Duty of Company to Prevent Injuries to Passengers by Other Passengers. [(1) p. 444].—**Liability of Company for Injury.**—A railroad company is liable to its passengers for injury done by another passenger only where the conduct of this passenger had been such before the injury as to induce a reasonably prudent and vigilant conductor to believe that there was reasonable ground to apprehend violence and danger to the other passengers, and in such a case it is the duty of the conductor to use all reasonable means to prevent such injury, and if he neglect his duty the company is responsible. (*Page 441.*)

Same—Duty of Company as to Removal of Disorderly or Dangerous Passengers from Train [(1) p. 444].—No right or duty devolves on a railroad conductor to put one passenger off because another is drunk, disorderly, or dangerous, and it is only where the company is in default as to the particular passenger that injures another that its liability can be established. (*Page 441.*)

Same—Injury to Passenger—Submission to Jury of Duty of Conductor.—Where there is a general disturbance and disorderly conduct on a railroad train, in the course of which a passenger is shot, the liability of the company should be finally submitted to the jury as to the conduct of the particular person who did the shooting, and as to the duty of the company to have expelled him from its cars before the shooting took place. (*Page 442.*)

Action for Injury Sustained by One Passenger at the Hands of Another. [(1) p. 444].—**Excessive Damages.**—In an action by a female white passenger against a railroad company for injuries received at the hands of a negro passenger by a pistol shot, it appeared that the case was tried a few weeks after the injury, before the wounds, which were severe and dangerous, were healed, which injury among other things had caused partial paralysis and disfigurement of the face; that the jury were doubtless influenced by the speculative character of the testimony of the physicians as to the possible permanent impairment of plaintiff's health, and as to serious constitutional troubles, and that the court limited the jury to the consideration of actual compensatory damages. *Held*, that a verdict of \$18,000 was excessive. (*Page 242.*)

Same—Striking Out Allegations and Proof of Conductor's Efficiency.—The trial court erred in striking out a portion of the answer affirming the known capacity and character of the conductor of the train on which the injury occurred, and in refusing to hear testimony in that respect, especially when by an instruction given for defendant the court made the efficient character and capacity of the conductor one of the elements.

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combined with other facts, whereon the jury were told they could find for the company. (*Page 443.*)

Same—Instruction as to Expense of Medical Treatment, Not alleged or Proved.—An instruction that the expense of medical treatment might be considered in estimating the actual damages is unwarranted where there is no allegation or evidence in that regard. (*Page 443.*)

Same—Unwarranted Assumption by Court of Existence of Drunkenness and Disorder.—The court erred in assuming the existence of drunkenness and disorder on the train, though such existence was denied by the company. (*Page 443.*)

APPEAL from Franklin county court of common pleas.
Reversed.

John W. Rodman, Wm. Lindsay, and H. W. Bruce, for appellant.

W. H. Holt, Knott & Edelin, and J. W. Scott, for appellee.

GRACE, J.—This is an appeal by the Louisville & Nashville Railroad Company from a judgment of the Franklin circuit court, rendered in November, 1891, in favor of plaintiff, Christine McEwan, for the sum of \$18,000 in damages for injuries sustained by her at the hands of a passenger on appellant's railroad in October, 1891. Case stated.

The petition and amended petition charge that, plaintiff being a passenger on said road at that time, having bought and paid for a round-trip ticket to Louisville and return to Frankfort, on an excursion train, on the return passage, on the night of October 21st, plaintiff being on said train, appellant suffered and permitted, wilfully and negligently, two disorderly, desperate, and dangerous men, who were drunk and boisterous, and armed with deadly weapons, to enter its train at Louisville, Ky., and to remain on same until it reached Lagrange, a distance of 25 miles, and, while on said train, to engage in improper, riotous, and disorderly conduct, and to insult, beat, and bruise their fellow-passengers, and to shoot and wound plaintiff, asserting that the officers and employes of this railroad company had notice of the dangerous, drunken, and boisterous character and conduct of these persons, and of the passenger who finally shot and wounded her, a sufficient time before this injury to have expelled said person from its cars, but negligently failed and neglected to do so.

The answer denied in detail these several allegations, as to the character of the men or their condition, or that it had

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notice of same, or that it had any good reason to apprehend injury to plaintiff by violence at the hands of either of said passengers; denied that it was guilty of any negligence, or that it had any right to eject said person from the train.

While the evidence on these several issues presented was conflicting, and particularly so, and doubtful and uncertain as to whether this passenger who shot and wounded plaintiff had given any, or at least sufficient, evidence of his drunken or dangerous character as to lead the officer of that train to entertain any reasonable ground of apprehension of violence to the other passengers, yet, being conflicting, we do not know that we should interfere with the verdict of the jury, which necessarily implies the finding of the facts referred to in favor of plaintiff, and against the defendant.

The facts further show abundantly that some other negro passengers on that train were drunk and disorderly, and one other, at least, appeared armed with a knife and drunk; but this one the conductor disarmed, and put off the
Facts. train, but, finding him on again, put him off a second time, and threatened to kill him if he ventured on the car again; and we hear no more of this passenger, nor did he injure any person.

The conductor likewise put off quite a number of other passengers, at East or South Louisville, who appeared to be disorderly. The train that night was crowded with passengers, both white and black, many standing up in the aisles of the cars. Some trouble coming up between the whites and blacks in the third car from the engine, the conductor restored order, seated the white people, and moved the negroes, who were standing up in the aisle, and of whom complaint was made, out of this car wherein the plaintiff was seated and riding, back into the fourth car, and locked the door. This was some half to three fourths of an hour before the difficulty came up in which plaintiff was shot.

The matters that led up to this shooting were that one McHotton, in the middle of the fourth car, becoming offended at some negro leaning on his seat (and it is uncertain whether it was the negro Watson, who shot plaintiff, or not), commenced an attack, first on that negro, and then on two or three others, knocking them forward out of that car, across the platform between that and the third car, knocking down two or three in this third car, including the negro Watson;

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that the conductor, coming up at this time, separated McHotton and the negroes, putting the negroes out of this third car, and locking the door, leaving McHotton in the third car, thus again restoring quiet, as he thought, and then, stepping into the fourth car, to learn something of this difficulty (the train slowing up for a station), he heard the shot fired that struck plaintiff. The evidence shows that this shot was fired by Watson through the glass door or transom of the third car, and at McHotton, striking and wounding plaintiff.

While there are over 200 pages of this record, yet the above are the material facts that led up to the shooting.

Plaintiff received the shot in the left side of her face, passing backward and to the right, breaking up the bones of the nostril, injuring some other small bones, and, passing between the large veins and the spinal cord, finally lodged near the back of the neck. Her face was partially paralyzed and disfigured, one nostril closed, and she was otherwise seriously and painfully injured. The parties do not seem to differ widely about the law as given by the court.

It may be stated briefly, in assuming the liability of a railroad to its passengers for injury done by another passenger, only where the conduct of this passenger had been such before the injury as to induce a reasonably prudent and vigilant conductor to believe that there was reasonable ground to apprehend violence and danger to the other passengers, and in that case asserting it to be the duty of the conductor of the railroad train to use all reasonable means to prevent such injury, and if he neglects this reasonable duty, and injury is done, that then the company is responsible, that otherwise the railroad is not responsible.

Duty of company to prevent injuries to passengers.

In this case it may be said that, if the railroad company is liable at all, it is only on the assumption that such a state of case existed, and this, it should be borne in mind, as to the particular passenger doing this injury. We deem it quite clear that no right or duty devolves on a railroad conductor to put one passenger off because another is drunk, disorderly, or dangerous. In each case it is a personal matter with each individual passenger, and it is only where the railroad company is in default as to the particular passenger who did the injury that this liability can be established.

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This view seems to have been lost sight of on the trial of this case, and not sufficiently pointed out in the instructions.

While, possibly, it may not be practicable to exclude from the jury, in introducing the evidence, what all others than this man Watson did, admitting as competent the evidence as to him only, because witnesses must speak of the whole as a part of the *res gestæ*, yet the liability of the road should be finally submitted by the court to the jury, as to the conduct of this particular person, and as to the duty of the railroad company to have expelled him from its cars before the shooting.

Again, this case presents itself as practically a contest between the whites and blacks, as to their respective rights and obligations on this train; this shooting having occurred before the passage of the separate coach bill in Kentucky.

**Excessive ver-
dict.**

And, while it is clear that the shooting of plaintiff by Watson was accidental, Watson, doubtless, intending only to shoot McHotton, yet it resulted that Watson, a negro, shot plaintiff, a white woman; and, these facts being potent, we doubt not, it was with great difficulty that a jury could be found to consider the case impartially, wholly without some feeling against the company on whose road it occurred.

Again, it appears that this case was tried in a few weeks after the injury of this lady, while her wounds were not fully healed; and the evidence shows a wide field of speculation drawn out by the lawyers of plaintiff, in examination of the physicians who testified, all looking to the possible permanent impairment of the health of plaintiff by reason of her injuries, and to serious constitutional troubles. All this line of speculation, doubtless, influenced the jury greatly in their estimate of damage to plaintiff.

On a retrial, many of the supposititious cases submitted by counsel at that time will, doubtless, be set at rest by the actual condition of plaintiff as it may now appear. At any rate, these things occur to us as possibly tending to the verdict rendered, which, although the court limited, and, as we think, properly, the jury to actual compensatory damage, excluding all consideration of punitive damages or smart money, yet the verdict, as we have seen, was for \$18,000.

On a careful review of the evidence in the entire case, we think this amount was excessive.

A motion was duly made for a new trial on this ground,

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and that same must have been given by the jury under the influence of passion or prejudice,—one of the causes laid down by the Code as authorizing the court to set aside the verdict and grant a new trial.

In announcing our opinion in this case, we are not attempting to lay down any new rule, nor to depart from the former rulings of this court, in reference to cases of this character. Each party has by counsel, in their briefs, collated quite a number of cases on each side of this line,—some wherein the court refuses to set aside verdicts, and others where the courts exercised that power; but as each case must, after all, depend upon its own peculiar facts and circumstances, it would be unprofitable to incumber this opinion with recitals of cases on either side.

As this case must go back for a retrial, there are some minor matters that we think well to mention. One is that we think the court erred in striking out that part of defendant's answer affirming the known capacity and character of the conductor as a faithful, efficient, courageous officer, and also in refusing to hear testimony on this line of defense offered by the appellant. This was especially error, when we come to consider the instruction given by the court for the defendant wherein the court makes the efficient character and capacity of the conductor one of the elements, combined with other facts, whereon the jury were told they could find for defendant. Doubtless, this matter was so left before the jury by oversight.

Allegations
and proof as to
condition
efficiency.

Another matter embraced in the instruction for estimates of actual damage was the expense incurred by appellee for medical treatment, etc., when there was neither allegation nor evidence on this point.

Expense of
medical treat-
ment—

Another matter complained of is that the court, in one of its instructions to the jury, assumed that the negroes were drunk and disorderly, though this was denied by defendant.

Assumption of
existence of
disorder.

These matters, though not of any great moment, we mention so that no errors may appear in the second trial.

Wherefore the judgment is reversed, and this cause remanded, for further proceedings consistent with this opinion.

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ABSTRACTS OF RECENT DECISIONS

(1) **Injuries to Passengers by Fellow Passengers, Employes, and Strangers** [(1) p. 445]—*Duty of Company*.—In *Farber v. Missouri Pacific Ry. Co.*, 111 Mo. 81, it was held that a railroad company is bound to protect passengers from violence and insults by strangers and co-passenger and, *a fortiori*, against the violence and insults of its own servants. Citing *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202; *Bryant v. Rich*, 106 Mass. 180; *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657; *Sherley v. Billings*, 8 Bush 147; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 8 Am & Eng. R. Cas. 354.

Same—Employé Acting without Scope of Employment.—It is the duty of a carrier not only to carry its passengers safely, but to protect them from ill-treatment from its servants, other passengers, and intruders, and it is liable for an injury or ill-treatment committed by its servants, whether in the line of their duty or not. *White v. Norfolk & S. R. Co.*, (N. C.) 20 S. E. Rep. 191.

Same—Same.—The liability of a railroad company for injuries to a passenger arises when the servant is acting within the scope of his employment. *Conway v. New Orleans & C. R. Co.*, 46 La. Ann. 1429.

Same—Liability for Injury by Concurrent Negligence of Employés and Third Persons.—A common carrier of passengers is liable for personal injuries to passengers produced by the concurrent negligence of its servants and third persons. *St. Joseph & G. I. R. Co. v. Hedge*, (Neb.) 62 N. W. Rep. 887.

Street railway companies are common carriers within the rule. *Pray v. Omaha St. R. Co.*, (Neb.) 62 N. W. Rep. 447.

Same—Instances—Brakeman Roughly Assisting Passenger on Car.—A verdict against a railroad company is justified by evidence that plaintiff, a female passenger, was directed by the conductor to get off the train and to get on at a place where there was no platform, and that, having difficulty in getting aboard, she was so roughly pulled on the car by a brakeman as to sustain the injuries complained of. *International & G. N. R. Co. v. Mulliken*, (Tex.) 32 S. W. Rep. 152.

Same—Same—Passenger Forced Off Station Platform by Skylarking Employés.—A railroad company is not liable for injuries received by a passenger about to board a train by reason of his being forced off a station platform by skylarking employés. *Goodloe v. Memphis & C. R. Co.*, (Ala.) 18 So. Rep. 166.

Same—Same—Passenger Forced Off Crowded Car—Province of Jury.—The plaintiff, a lad of 14 years of age, boarded the defendant's train at South Omaha, bound for the city of Omaha. When he reached the train, which was waiting at the terminus of the line, it was so crowded that he was unable to get inside, but secured standing room on the rear platform of the trailer. When the first stop was made, four blocks distant, he stepped off the train to allow

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a fellow passenger to alight, and was unable to get upon the platform again, his place being occupied by other passengers. He went forward immediately, and secured standing room on the front step of the trailer, holding on to the dashboard and to the iron rail attached to the car for the distance of a block, when he was forced, by the pressure of the other passengers on the platform, to relinquish his hold, and fell, receiving the injuries complained of. There was evidence tending to prove that the pressure which forced him off the train was occasioned by the conductor forcing his way through the crowd while engaged in collecting fares. *Held*, that the question of negligence was for the jury, and that it was error to direct a verdict for the defendant. *Pray v. Omaha St. R. Co.*, (Neb.) 62 N. W. Rep. 447.

Same—Same—Assault at Station by Police Officer in Employ of Company.—A railroad company is liable to a person who being aroused from a sleep in a station leaves the same, and on returning is struck by a billy in the hands of a police officer in the employ of the company. *Texas & P. Ry. Co. v. Bowlin*, (Tex.) 32 S. W. Rep. 918.

Same—Same—Injury to Excursionist on Steamboat Chartered from Railroad Company.—A railroad company owning and operating steamboats under its charter, which hires one of its boats, fully manned by officers and crew in its pay, to the managers of an excursion, is liable for injuries sustained by a passenger in consequence of an assault by one of the crew, unless the company transferred to the managers the right to discharge the crew and to hire others in their stead, and although the contract of carriage was made by the injured passenger with the managers. *White v. Norfolk & S. R. Co.*, (N. C.) 20 S. E. Rep. 191.

Same—Same—Charter to Run to Points not on Regular Line of Company.—In such a case it is immaterial that the boat was chartered to run to points not on the regular lines of the company. *Id.*

Same—Same—Hire of Boat without Crew.—It seems, however, that the company would not be liable if the boat had been hired without the crew and without further stipulations. *Id.*

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(1) p. 444] **Injuries to Passengers by Servants of Carrier and by Fellow Passengers—Obligation and Liability of Company.**—The compensation which a carrier of passengers receives from its passengers is not only in consideration that he will transport them from one point to another as may be agreed upon, but that during the time he is so transporting them reasonable diligence will be used to protect the passengers from insult and injury. It results, necessarily, that the contract between the carrier and the passenger must guarantee immunity to the passengers from violence at the hands of those whose

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duty it is to afford this stipulated protection. *Sherley v. Billings*, 8 Bush 147.

A common carrier is bound, so far as practicable, to protect its passengers while being conveyed, from violence committed by strangers and co-passengers, and such carrier undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract. *Commonwealth v. Power*, 7 Met. (Mass.) 596; *Pittsburg, Ft. W. & C. Ry. Co. v. Hinds*, 53 Pa. St. 512; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 213; *Stewart v. Brooklyn & C. Y. R. Co.*, 90 N. Y. 588, 12 Am. & Eng. R. Cas. 127.

A railroad company therefore owes to every passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for its own or its servants' neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented. And while not required to furnish a police force sufficient to outweigh all force, when unexpectedly and suddenly offered, it is the duty of a railroad company to provide ready help sufficient to protect the passengers against assaults from every quarter which might reasonably be expected to occur under the circumstances of the case and the condition of the parties. *Britton v. Atlantic & C. A. L. Ry. Co.*, 88 N. C. 536, 18 Am. & Eng. R. Cas. 391; *citing New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200; *Pittsburgh & C. R. Co. v. Pillow*, 76 Pa. St. 510; *Flint v. Norwich & N. Y. Transp. Co.*, 34 Conn. 554.

See also, as supporting the rule above announced, *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202; *Howe v. Newmarch*, 12 Allen. 49; *Moore v. Fitchburg R. Corp.*, 4 Gray 465; *Seymour v. Greenwood*, 7 Hurl. & Nor. 355; *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365; *Weed v. Panama R. Co.*, 17 N. Y. 362; *Philadelphia & R. R. Co. v. Derby*, 14 How. 468; *Landreaux v. Bell*, 5 La. (O. S.) 435; *Nieto v. Clark*, 1 Cliff. 145; *Chamberlain v. Chandler*, 3 Mason (U. S.) 242; *Bryant v. Rich.* 106 Mass. 180; *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657; *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608.

"The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger, but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and copassengers, but, a *fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the wilful misconduct of the carrier's servant, the carrier is

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necessarily responsible. * * * The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his passenger's journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to have promised to do what, under the circumstances, the law requires him to do. We say conclusively presumed, for the law will not allow the carrier by notice or special contract even to deprive his passenger of this degree of care. If the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains." *Goddard v. Grand Trunk Ry. Co., supra.*

It is the duty of the proprietors of railroads, and common carriers of passengers generally, to secure passengers from annoyance, fright and terror, resulting from the misconduct of their servants or of other passengers. *Jencks v. Coleman*, 2 Sumn. 221; *Camden & A. R. & Transp. Co. v. Burke*, 13 Wend. (N. Y.) 611; *Pardee v. Drew*, 25 Wend. 459; *Pickford v. Grand Junc. Ry. Co.*, 8 M. & W. 372.

Accordingly, it has been held that a conductor of a street railway car may exclude or expel therefrom a person who by reason of intoxication or otherwise, is in such a condition as to render it reasonably certain that by act or speech he will become offensive or annoying to other passengers thereon, although he has not actually committed any act of offence or annoyance. *Vinton v. Middlesex R. Co.*, 11 Allen 304.

And in *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 8 Am. & Eng. R. Cas. 354, it was shown that a passenger on arriving at the place to which he had paid his fare on a railroad train, missed his watch, and supposing it to have been stolen, refused to leave the train until he should recover his property, and the conductor consented that he might remain on the train until it reached another station, and after the train had started and a partial search had been made, a fellow-passenger asked who he thought had his watch, when he replied "that fellow," pointing at a brakeman, who immediately struck him in the face with a lantern. *Held*, that the facts showed a right of action against the railroad company for the injury inflicted by its servant, and that the company occupied the same position towards the passenger as if he had paid his fare to such other station.

A railroad corporation is responsible for an assault and battery by the conductor of one of its trains upon a passenger in seizing or attempting to seize the property of the latter to enforce payment of his fare. *Ramsden v. Boston & A. R. Co.*, 104 Mass. 117.

And if a brakeman employed on a railway passenger train assault and grossly insult a passenger, and the company retain the offending servant in its service, after his misconduct is known to the company, it will be liable for exemplary damages. *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202.

In this case, the plaintiff, a highly respectable citizen and a passenger in the defendant's railway car, on request, surrendered his ticket to a

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brakeman, authorized to demand and receive it. Shortly afterwards, the brakeman, without provocation, approached the plaintiff in his seat, and accosting him in a loud voice, denied in the presence of the other passengers, that he had seen or received the plaintiff's ticket, and used coarse, profane, and grossly insulting language towards the plaintiff, and called him a liar, and charged him with then attempting to evade the payment of his fare, and with having done so; and, leaning towards the plaintiff, who was in feeble health, and partially reclining in his seat, brought his fist down close to the passenger's face, and violently shook it there, and threatened to split the plaintiff's head open and to spill his brains right there on the spot, with much more to the same effect. The defendant, although well knowing of this misconduct of the brakeman, retained him in his place, which he continued to occupy at the time of the trial. The jury was instructed that the case was a proper one for exemplary damages, and they returned a verdict for \$4850, which the court declined to set aside.

A common carrier of passengers, who is wilfully negligent, by its servants and agents, in failing to interfere and prevent, or endeavor to prevent, injuries to passengers by fellow passengers, is liable for all damages resulting from such injury, under such circumstances. *Holly v. Atlanta St. R. Co.*, 61 Ga. 215. *Citing Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 108; *Bodley v. Roop*, 6 Blackf. 158. In the case of *Holly v. Atlanta St. R. Co.*, *supra*, it appeared that upon the car whereon the plaintiff was a passenger, two other passengers engaged in riotous fighting, whereby the plaintiff took fright, and, in endeavoring to get off the car, was severely injured; that there was no conductor upon the car, and that the driver failed to stop the fight between the passengers. The court decided that not only the railroad company was bound to extraordinary diligence, and was liable for the negligence of its agents and employes in and about the carriage of passengers, but that it is for the jury to say, under all the facts in the case, whether the company was negligent in not providing a suitable conductor to preserve order, or whether the person in charge of the car, as driver, was negligent in the preservation of order therein.

A conductor falls far short of his duty when he keeps his train in motion, or is busy in collecting fare in one car, whilst a general fight is raging in another car. Merely calling on the passengers to throw the fighters out is not enough to relieve the conductor and the company from responsibility in such a case. It is the duty of the conductor, under such circumstances, to lead the way, stop the train, and expel the rioters, or demonstrate by an earnest endeavor to do so that this is impossible. *Pittsburgh, Ft. W. & C. Ry. Co. v. Hinds*, 53 Pa. St. 512.

And it has been said that the slightest degree of negligence on the part of a conductor of a car or train, resulting in injury to a passenger, without fault on the latter's part, will render the company liable. *Pittsburgh & C. R. Co. v. Pillow*, 76 Pa. St. 510.

Same—Malicious Injuries by Servant—Liability of Company.—The rule relieving a master from liability for a malicious injury inflicted

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by his servant when not acting within the scope of his employment does not apply as between a common carrier of passengers and a passenger so injured by a servant of the carrier. *Stewart v. Brooklyn & C. T. R. Co.*, 90 N. Y. 588, 12 Am. & Eng. R. Cas. 127.

It follows, therefore, that when an injury is wantonly and wilfully inflicted by such a servant the jury may, in addition to the actual damages sustained, visit upon a railroad company vindictive or punitive damages by way of punishment for the wrongful act, but a passenger is not "entitled" to such damages as a matter of right, and it is error to so instruct the jury. Whether the party may have such damages rests largely in the discretion of the jury, under all the circumstances, and they should be left free to exercise their judgment upon the evidence in this respect. *Wabash, St. L. & P. Ry. Co. v. Rector*, 104 Ill. 296, 9 Am. & Eng. R. Cas. 264. See, also, *Illinois Cent. R. Co. v. Parks*, 88 Ill. 375; *Chicago, B. & Q. R. Co. v. Bryan*, 90 Ill. 126; *Atlantic & G. W. Ry. Co. v. Dunn*, 19 Ohio St. 162; *Pittsburgh, A. & M. Pass. Ry. Co. v. Donahue*, 70 Pa. St. 119.

But if a railroad company is to be held liable not only for the actual damages caused by the malicious acts of its servants, but also in punitive damages for such malice, the malice and wantonness of the servants must be brought home, and directly charged, to the principal, and proved as alleged. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 212; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48; *Levitzky v. Canning*, 33 Cal. 299; *Bracegirdle v. Orford*, 2 M. & S. 77; *Merest v. Harvey*, 5 Taunt. 442.

A railway company is liable for the malicious and criminal acts of its employes as regards passengers while they are executing what they suppose to be the orders of the company, even though the orders do not in fact contemplate such acts. *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa 314; *citing Turner v. North Beach & M. R. Co.*, 34 Cal. 594; *Great Western Ry. Co. v. Miller*, 19 Mich. 305; *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110; *Isaacs v. Third Avenue R. Co.*, 47 N. Y. 122; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 212; *Bryant v. Rich*, 106 Mass. 180; *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657.

In other words, this liability of a railroad company for such acts remains, although the acts done were not directly or impliedly authorized or ratified by the corporation. *Quigley v. Central Pacific R. Co.*, 11 Nev. 350.

A common carrier of passengers is liable for a malicious assault by a servant on a passenger in its charge, the moving cause of the assault being the passenger's expostulation with the servant for an assault on a third person outside the vehicle. *Stewart v. Brooklyn & C. T. R. Co.*, 90 N. Y. 588, 12 Am. & Eng. R. Cas. 127.

Mental Anguish as Element of Damage.—Mental anguish arising from the nature and character of an assault made by an employe

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of a railway company upon a passenger is a proper element of compensatory damages, and the outrage and indignity which have accompanied such an injury are to be estimated as well as its physical effects, even in cases where exemplary damages do not lie. *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa 314.

Pleading—Sufficiency of Complaint.—Where a complaint against a railroad company for an injury to the plaintiff shows that he was rightfully upon the train of the defendant as a passenger, and alleges that the servants and agents of the defendant wrongfully struck and threw the plaintiff from the cars, it sufficiently shows that the wrong complained of was committed by the servants of the defendant in their employment of running the train of cars. *Pittsburgh, C. & St. L. Ry. Co. v. Troxell*, 57 Ind. 246.

Same.—Duty Upon Passengers not to Provoke Disturbance.—There is a duty resting upon passengers to so demean themselves towards the servants of a railroad company as not, by misbehavior, to provoke a personal quarrel with them. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 133; *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420; *Chicago & N. W. Ry. Co. v. Williams*, 55 Ill. 185.

In other words, it is not more the duty of railroad companies to transport their passengers safely than it is of the passengers to behave in a quiet and orderly manner. *Pittsburgh, Ft. W. & C. Ry. Co. v. Hinds*, 53 Pa. St. 512.

RINGWALT (Mary C.)*v.***WABASH R. CO. et al.***(Nebraska Supreme Court Sept. 17, 1895.)*

Liability of Railroad Company for Baggage—[(1) p. 471]—**Necessary the Company Should have Possession.**—A common carrier undertaking to transport the baggage of its passenger is held by the law to the strictest accountability, and if the carrier receives such baggage, and undertakes its carriage, it cannot be relieved from liability therefor by anything save the act of God or the public enemy; but a carrier is not liable for the baggage of its passengers unless the evidence showed that the baggage claimed to be lost, and sued for, came into the possession of the carrier. (*Page 453.*)

Same—Loss of Jewelry from Trunk—[(1) p. 471]—**Agency of Carrier of Baggage from Depot to Residence—Necessity of Proving Loss While Baggage in Possession of Company.**—R. purchased from the Wabash Railroad Company, at Omaha, Neb., a ticket from that place to Lexington, Ky. In making the journey according to the terms of the ticket, R. traveled first over a line of the Union Pacific Railway Company, then over the line of the Wabash Railroad Company, thence over the lines of other carriers to Lexing-

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ton. On the afternoon of the day she began her journey from Omaha, R. placed her jewelry in her trunk, locked it, and delivered it to a drayman, by whom it was transported from her residence to the depot of said Union Pacific Railroad Company, whose agent then accepted the trunk, and checked it through to Lexington. The last carrier, at its depot in Lexington, delivered the trunk to a drayman, who hauled it to R.'s residence, where it was opened, and R. then discovered that her jewelry was missing. The trunk bore no indication of having been opened or tampered with. In a suit by R. against the Wabash Railroad Company for the value of said jewelry, *held*: (1) That the trunk, while in the possession of the draymen at Omaha and Lexington, was in possession of R.'s agents; (2) until some evidence was introduced showing that the trunk was not opened or tampered with while in the possession of said draymen, the presumption would not arise that the jewelry was lost from the trunk while in the possession of any of the said railroad companies. (Page 451-2, 454.)

ERROR to Douglas county district court. *Affirmed.*

Morris & Beekman, for plaintiff in error.

John L. Webster, for defendants in error.

RAGAN, C.—In April, 1890, Mrs. Mary C. Ringwalt purchased of the Wabash Railroad Company, at Omaha, Neb., a railroad ticket from that city to Lexington, Ky. In the journey on the ticket Mrs. Ringwalt traveled over the line of the Union Pacific Railway Company from Omaha to Council Bluffs, Iowa; from Council Bluffs, Iowa, to St. Louis, Mo., over the lines of the Wabash Railroad Company and the Omaha & St. Louis Railroad Company; from St. Louis, Mo., to Cincinnati, Ohio, over the line of the Ohio & Mississippi Railroad Company; and from Cincinnati, Ohio, to Lexington, Ky., over the line of the Cincinnati Southern Railway Company. Facts.

On the day that Mrs. Ringwalt left the city of Omaha to make her journey, she delivered her trunk, containing certain articles of personal property, to the Wabash Railroad Company, for transportation as baggage to Lexington. The delivery of the trunk was made to the Wabash Railroad Company by delivering it to the Union Pacific Railway Company at its depot in the city of Omaha, the first carrier over whose line of road Mrs. Ringwalt would travel in making her journey, according to the terms of her ticket.

The agent of the Union Pacific Railway Company examined the ticket held by Mrs. Ringwalt, punched the same, accepted the trunk or baggage of Mrs. Ringwalt, and checked the same through to Lexington, delivering at the same time

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to Mrs. Ringwalt the ordinary railroad check or receipt used by common carriers in this country, and the production of which at Lexington would authorize the delivery of the trunk to the holder of said check or receipt.

Mrs. Ringwalt brought this suit to the district court of Douglas county, against the Wabash Railroad Company, to recover the value of certain jewelry belonging to her, and which she alleges was in said trunk when it was accepted and checked by the Wabash Railroad Company, and which jewelry was stolen from said trunk while in transit between the cities of Omaha, Neb., and Lexington, Ky.

At the close of the evidence the jury, in obedience to an instruction of the district court, returned a verdict in favor of the Wabash Railroad Company; and, to reverse the judgment of dismissal entered upon this verdict against her, Mrs. Ringwalt has prosecuted to this court a petition in error.

There are a number of interesting and important legal questions extensively discussed in the briefs of counsel for the respective parties to this case, but an examination of these questions becomes unnecessary, in view of the fact that we have reached the conclusion that the judgment of the district court must be sustained solely on the ground that the evidence in the record is insufficient to sustain a finding and judgment against the Wabash Railroad Company for the property sued for.

The evidence is that the jewelry was placed in the bottom of the trunk by Mrs. Ringwalt, at her residence, or where she was stopping, in the city of Omaha, about 3 o'clock in the afternoon; that the trunk was locked, and sent by an expressman or drayman to the Union Pacific depot, where it was checked about 4 o'clock in the afternoon of the same day. The trunk appears to have reached Lexington, Ky., late in the afternoon, and was taken from the depot of the carrier last transporting it to the residence or stopping place of Mrs. Ringwalt in Lexington, by an expressman or drayman. In the night of the arrival of said trunk, Mrs. Ringwalt opened the same, and then discovered that the jewelry sued for was missing. The condition of the trunk was apparently in all respects the same when received by Mrs. Ringwalt in Lexington that it was when she started it from Omaha. The lock of the trunk had not been broken, nor had the trunk been opened, so far as could be ascertained.

Facts continued.

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We assume, for the purposes of this case, the competency of the Wabash Railroad Company to enter into a contract with Mrs. Ringwalt to transport herself and baggage from the city of Omaha, Neb., to Lexington, Ky., and that the Wabash Railroad Company would be liable to Mrs. Ringwalt for any default in the performance of such contract.

We also assume that the Union Pacific Railway Company, in all that it did towards the transporting of Mrs. Ringwalt on the ticket she held from Omaha to Council Bluffs, and in accepting, checking, and forwarding her trunk or baggage, as acting for and on the behalf of the Wabash Railroad Company. And if the evidence would support a finding that the jewelry sued for in this action was in the trunk of Mrs. Ringwalt at the time the trunk was accepted and checked by the agent of the Union Pacific Railway Company at the depot in Omaha by virtue of the ticket held by Mrs. Ringwalt, and if the evidence would support the further finding that said jewelry was not in said trunk at the time it was delivered to Mrs. Ringwalt by the last carrier, at Lexington, then we have no doubt as to the accountability of the Wabash Railroad Company to Mrs. Ringwalt for the value of said jewelry.

There is, however, a lack of evidence to show that the jewelry sued for was in the trunk when checked at the Union Pacific depot at Omaha, Neb. Had the expressman or drayman who hauled the trunk from the residence of Mrs. Ringwalt to the depot at Omaha been called, and testified that he transported the trunk to the depot, and delivered it to the agent there in the same condition in which he received it, we think that this would have been sufficient evidence to sustain a finding that the trunk, when delivered to the Wabash Railroad Company, contained the jewelry sued for.

Absence of evidence of loss while baggage in possession of company.

A common carrier, undertaking to transport the baggage of its passenger, is held by the law to the strictest accountability, and if the carrier receives such baggage and undertakes its carriage, it cannot be relieved from liability therefor by anything save the act of God or the public enemy; but, while the law holds the carrier to this rigid accountability, we know of no rule of law that will render a carrier liable for the baggage of a passenger unless the evidence shows

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that the baggage sued for came into the possession of the carrier.

There is one thing further to be said of this judgment. If we should hold that the evidence is sufficient to support a finding that the jewelry sued for was in the trunk of Mrs. Ringwalt when it was accepted for transportation by the Wabash Railroad Company at Omaha, still there is no evidence which shows, or tends to show, that this trunk may not have been opened, and the jewelry abstracted from it, after it was delivered by the last carrier, at Lexington, to the expressman or drayman who transported it from the depot there to the stopping place of Mrs. Ringwalt. The Wabash Railroad Company cannot be held liable to Mrs.

Evidence of loss. Ringwalt for this jewelry on mere conjectures. The law does not presume that the expressman who hauled the trunk from Mrs. Ringwalt's residence in Omaha, Neb., to the depot there, opened the trunk and stole the jewelry. It does not presume that the agent or servants of any of the carriers between Omaha and Lexington opened the trunk and stole the jewelry, or that the jewelry was stolen by the drayman in Lexington who transported the trunk from the depot at that place to the residence of Mrs. Ringwalt. The law presumes dishonesty in no man, and to hold the Wabash Railroad Company liable in this action, on the evidence in this record, would be to indulge the presumption of honesty on the part of the drayman at Omaha and Lexington, and dishonesty on the part of the servants of the railroad carriers.

If the evidence in the record before us showed affirmatively that the trunk was not opened or tampered with between the house of Mrs. Ringwalt and the Union Pacific Railway depot at Omaha, and that the trunk was not opened or tampered with from the time it was delivered to the agent of Mrs. Ringwalt at the last carrier's depot, at Lexington, until it reached the hands of Mrs. Ringwalt, the case would be entirely different, and the liability of the Wabash Railroad Company for the property fixed; but the trunk, while in the possession of the drayman at Omaha and in the possession of the drayman at Lexington, was in the hands of the agents of Mrs. Ringwalt, and the presumption will not arise that the jewelry was lost or stolen while in the possession of the Wabash Railroad Company, until she produces such evidence

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as will sustain a finding that the jewelry was in the trunk when it was accepted by the Wabash Railroad Company for carriage, and that the trunk had not been opened or tampered with from the time it was delivered by the last carrier to her agent in Lexington until she opened it and found the jewelry missing.

For the sole reason that the evidence will not support such findings, the judgment must be and is affirmed.

Affirmed.

PENNSYLVANIA CO.

v.

LIVERIGHT (Max *et al.*).

(*Appellate Court of Indiana, Sept. 17, 1895.*)

Duty of Company as to Baggage [(1) p. 471]—Termination of Liability as Carrier—Commencement of Liability as Warehouseman.—The duty of a railroad company is not fully performed by simply delivering baggage to its own agent at the station, but the passenger is entitled to a reasonable time within which to receive his baggage before the liability of the company as carrier ceases and its duty as warehouseman commences. (Page 456.)

APPEAL from Marion county superior court. *Affirmed.*

Saml. O. Pickens, for appellant.

Morris, Newberger & Curtis, for appellees.

GAVIN, J.—Appellees sued to recover the value of a lost trunk, checked as baggage by one of them, while traveling as a passenger from Madison to Indianapolis, over appellant's railroad. The Indianapolis Union Railway Company owns the Union Station at Indianapolis, and acts as the receiving and delivering agent for appellant as to such baggage as it hauls to that point. The sufficiency of the complaint hinges upon appellant's proposition that "the relation of the Pennsylvania Company and its agent, the Union Railway Company, to the goods in question was that of a warehouseman, from the moment the trunks were delivered by the former into the possession of the latter at Indianapolis." Case stated.

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Counsel rely upon a number of cases involving the duty of the carrier of ordinary freight. *Bansemmer v. Railway Co.*, 25 Ind. 434; *Railway Co. v. McCool*, 26 Ind. 140; *Express Co. v. Darnell*, 31 Ind. 20; *Railway Co. v. Nash*, 43 Ind. 423; *Transportation Co. v. Merriam*, 111 Ind. 5,—the original case being founded upon *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray 263.

Without undertaking to determine the correctness of, or the limitations upon, the rule advocated as applicable to ordinary freight, the position cannot be regarded as tenable, either upon principle or authority, when a passenger's baggage is the subject of controversy.

It was ruled by this court in *Railway Co. v. Tapp*, 6 Ind. App. 304, that "it was the duty of the appellant or its servants to give the appellee a reasonable time, after the arrival of the trunk at Russiaville, to take it away, before locking it up in the warehouse, and, failing to do so, the liability of the company as a carrier did not cease."

It was appellant's duty, as a carrier, not only to haul the baggage to Indianapolis, but there to deliver it to appellees, if called for within a reasonable time. If not, it could hold it as a bailee for hire, and its duty as warehouseman then arose. Its duty as carrier was not fully performed by simply delivering the baggage to its own agent at the station. It does not even follow, from its receipt by the Union Railway Company, that the trunk was *eo instante* ready for delivery to the passenger, although we do not base our decision upon this fact, but rather upon the broader ground that the passenger is entitled to a reasonable time within which to receive his baggage before the strict carrier's liability ceases, and the less burdensome responsibility as warehouseman begins. Our conclusion is in harmony with the almost universal opinion expressed by courts and text writers. *Roth v. Railway Co.*, 34 N. Y. 548; *Burnell v. Railway Co.*, 45 N. Y. 184; *Matteson v. Railway Co.*, 76 N. Y. 381; *Railway Co. v. Mahan*, 8 Bush 184; *Wald v. Railway Co.*, 92 Ky. 645; *Mote v. Railway Co.*, 27 Iowa 22; *Arthur v. Railway Co.*, 61 Iowa 651; *Railway Co. v. Capps*, 2 White & W. Civ. Cas. Ct. App. 35; *Ouimit v. Henshaw*, 35 Vt. 605; *Lin v. Railway Co.*, 10 Mo. App. 125; *Railway Co. v. Addizoat*, 17 Ill. App. 632; *Hutch. Carr.* § 708; 3 Wood, R. R. (Ed. 1894) §§ 400, 402.

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carrier.

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In section 402 of the authority last cited it is said: "The liability of a common carrier for the baggage of a passenger continues until the baggage is ready to be delivered to the owner at his destination, and until he has had a reasonable opportunity of receiving and removing it. What constitutes such reasonable time and opportunity is a mixed question of law and fact, necessarily dependent upon the peculiar circumstances of each particular case." As to just what constitutes a reasonable time, courts differ; but we are not called upon to solve that question. Massachusetts, in *Nealand v. Railway Co.*, 36 N. E. 592, indicates a willingness to apply to baggage the rule laid down in the *Gray* case. We are, however, satisfied that this rule should not be extended by analogy.

Under the evidence, the court was fully justified in finding that the baggage never was ready for delivery to the appellees.

Judgment affirmed.

ST. LOUIS SOUTHWESTERN R. CO.

v.

BERRY (Pleas and Kate).

(*Supreme Court of Arkansas, April 20, 1895.*)

Liability of Company for Loss of Money Received for Transportation as Baggage [(1) p. 471]—A railroad company is liable as insurer for money which a passenger in good faith includes in his baggage to pay travelling expenses and for personal use on his journey, provided no more is taken than is necessary or usual for passengers of like station, habits, and condition in life while on similar journeys, and for any amount in excess of this the company is not liable as an insurer, unless it receives it with notice that the quantity is greater than is usually carried by passengers under similar circumstances. (*Page 458.*)

Scope of Authority of Baggage Master Accepting as Baggage Money in Excess of that Prescribed by Rule.—A baggage master is acting within the scope of his employment when he receives more money to be transported as baggage than the rules of the company authorize him to receive. (*Page 459.*)

Liability of Company for Money in Excess of Travelling Expenses, etc., Accepted as Baggage by Agent, with Notice—Ignorance of Passenger of Rule Forbidding Acceptance.—Where a passenger who has no knowledge

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of a rule of a railroad company which forbids its agents to receive money for transportation as baggage, delivers to a baggage master of the company a trunk containing an amount of money beyond that forbidden by the rule, and informs him of the amount, if the baggage is shipped and a loss occurs, the company is liable. (*Page* 459.)

APPEAL from Monroe county circuit court. *Affirmed.*

Sam H. West and *J. C. Hawthorne*, for appellant.

M. J. Manning and *David A. Gates*, for appellees.

WOOD, J.—The appellant asked the following instructions:
(1) “The jury are instructed that a railway company is not liable for the loss of money shipped as baggage in excess of an amount necessary to be used while on a journey.”
Instructions. (2) “If the jury find from the evidence that the defendant is not engaged in transmitting money, it would not be liable for the loss of money, when shipped as baggage, even if its agents were informed that money was contained in the trunk shipped as baggage.” The court refused these, and, in effect, charged the jury that if a passenger, who had no notice of the company’s instructions to its agents forbidding the taking of money for transportation as baggage, delivered to the agent of the railway company a trunk containing money to be transported as baggage, and informed the agent who checked the trunk that it contained money, and the agent, after being so informed, received the same, that then, in case of loss, the carrier would be liable. The requests given and refused present the only question for our determination.

The carrier is liable, as insurer, for money which the passenger, *bona fide*, includes in his baggage to pay traveling expenses, and for personal use on his journey, provided no more is taken than is necessary or usual for passengers of like station, habits, and condition in life, while on similar journeys. Hutch. Carr. §§ 682, 685, 688; Schouler, Bailm. §§ 669–671; Story, Bailm. § 499; 3 Wood, R. R. § 401; Jordan v. Railroad Co., 5 Cush. 69; Ror. R. R. 988; Ang. Carr. § 115; 2 Beach, R. R. § 901; 2 Redf. R. R. 59. For any amount in excess of this,—which is a question for the jury,—the carrier is not liable, as such, unless he receives it with notice that the quantity is greater than is usually carried by passengers under the same or similar circumstances. And the passenger

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must observe the utmost candor and good faith in presenting his baggage for transportation, for the carrier is only required to transport according to appearances. If the passenger presents his baggage in a closed receptacle, such as is ordinarily carried as baggage, in order to lay upon the carrier the extraordinary responsibility of insurer the passenger must inform him if it contains any articles which the carrier is not bound to transport as baggage. This is for the reason that the carrier, when thus notified, may refuse to carry altogether, or accept and charge an additional sum to the passenger's fare for the onerous liability he thus assumes. Schouler, Bailm. § 669 *et seq.*; Hutch. Carr. § 685; Edw. Bailm. § 529; 3 Wood, R. R. §§ 401, 406, 408; Railroad Co. v. Fraloff, 100 U. S. 24; 2 Beach, R. R. 902; Davis v. Railroad Co., 22 Ill. 278; Railroad Co. v. Copeland, 24 Ill. 332; 1 Rep. & Mack 3 Dig. of Railway law, "Baggage," and authorities there cited.

The baggage-master is not out of the scope of his employment when he receives more money for transportation as baggage than, by the rules of the company or instructions from his employer, he is authorized to receive, for the carrier does carry some money as baggage. And the agent whose business it is to receive and check for baggage has the implied authority to bind his employer, the carrier, by virtue of the nature of his employment, and the duties incident to it. Hutch. Carr. § 688; 3 Wood, R. R. § 408; Minter v. Railroad Co., 41 Mo. 503; Strauss v. Railway Co., 17 Fed. 209. As was said by a distinguished judge of New York: "The contract to carry the baggage of passengers, as incident to the contract to carry the person, does not become defined, as to particular baggage, its amounts, or other incidents, until the baggage is delivered to the baggage-master." Isaacson v. Railroad Co., 94 N. Y. 278.

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authority of
baggage-
master.

We conclude that where a passenger, who is ignorant of the rules or instructions of railway companies forbidding their agents to receive money for transportation as baggage, delivers to the baggage agent more money than the carrier is required to transport, and informs the agent of the amount, if he accepts it to ship as baggage, and a loss occurs, the carrier's common-law liability will attach. We are aware that a different rule prevails in some of the states, notably Massachusetts.

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money without
notice of rule.

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Blumantle v. Railroad Co., 127 Mass. 322; Alling v. Railroad Co., 126 Mass. 121; Jordan v. Railroad Co., 5 Cush. 69. See also, Bomar v. Maxwell, 9 Humph. 620; Collins v. Railroad Co., 10 Cush. 506. But the weight of authority is with the rule as we have announced it. Railroad Co. v. Baldauf, 16 Pa. St. 67; Hutch. Carr. § 685; Jacobs v. Tutt, 33 Fed. 412; Railroad Co. v. Fraloff, 100 U. S. 24; Humphreys v. Perry, 148 U. S. 627; Railway Co. v. Shepherd, 8 Exch. 30; Minter v. Railroad Co., 41 Mo. 503, and other cases cited in brief of counsel for appellee. See Rap. & Mack, Dig. of Railroad Law, pp. 536, 539, and cases cited.

While most of these cases have reference to merchandise in some form, yet the *rationale* of the doctrine, as to it, is equally applicable to money where it is carried as baggage. As to what would be the rule if the money was accepted and carried as freight is nowhere presented. The proof on the part of plaintiffs showed that the agent who checked the trunk was informed of the amount of money it contained before he checked it for transportation.

The instructions, therefore, being in harmony with the law, and the verdict of the jury having evidence to support it, *the judgment of the Monroe circuit court is affirmed.*

SOUTHERN KANSAS RY. CO.**v.****CLARK (B. C., et al.)***(Kansas Supreme Court, December 9, 1893.)*

Liability of Company for Theft from Sample Cases in Baggage Room.— A railroad company is not bound, as a part of its contract for the transportation of a traveller who is employed as a travelling salesman for a trading firm, to carry as his personal baggage a case of sample merchandise belonging to his employers; and where it receives and checks such case without knowledge of its contents or ownership, a part of which is afterwards stolen from its baggage room without negligence on the part of the company, it is not liable to the owners for the value thereof. (Page 462.)

ERROR to Butler county district court. *Reversed.*

Geo. R. Peck, A. A. Hurd and Robert Dunlap, for plaintiff in error.

Peckham & Henderson, for defendants in error.

ALLEN, J.—This action was commenced before a justice of the peace of Cowley county, where a judgment was rendered in favor of the defendant for costs.

Plaintiffs appealed to the district court, from which a change of venue was taken, because the judge of that court had been of counsel in the case, to Butler county, where the case was tried, and a judgment rendered in favor of the plaintiffs for \$136.79. Case stated.

The railroad company brings the case here for review.

By leave of the court the plaintiffs filed an amended bill of particulars in the Butler county district court, in which they alleged, in substance, that they were partners as wholesale dealers in crockery, table and pocket cutlery, and other wares; that the defendant was a railroad corporation, engaged in the business of transporting passengers and freight for hire as common carriers; that plaintiffs had in their employ as a travelling salesman one E. H. Bliss; that on the 24th day of December, 1884, said Bliss, in the regular course of his employment, purchased from the defendant, with the money of the plaintiffs, a first-class passenger ticket from Kansas City to Winfield, Kan.; that said Bliss carried with him a sample roll of cutlery, the property of the plaintiff, and which was used by him in the prosecution of his business as a travelling salesman for the plaintiffs; that at the time of purchasing said ticket he delivered said sample roll of cutlery to the defendant to be carried from Kansas City to Winfield, taking a check for the same in the usual way; that the defendant failed and neglected to deliver said roll of cutlery at its place of destination,—and asked judgment for the value thereof.

It appears from the testimony that Bliss purchased a ticket at Kansas City on the night of the 23d of December, 1884. The property in controversy had been checked from Leavenworth to Kansas City, and Bliss had it rechecked at the Union Depot to Winfield. Bliss purchased his ticket with moneys of the plaintiff. The case containing the roll of cutlery was checked as ordinary baggage, no extra compensation being paid for its transportation, nor was anything said, at the time

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it was checked, as to whose property it was. Bliss arrived in Winfield about 9 o'clock on the morning of the 24th, and went directly to his home, without calling for the roll of cutlery. On the morning of the 25th he went to the defendant's depot, where he found that the roll of pocket cutlery had been taken from his sample case.

Plaintiff in error has filed a brief calling the attention of the court to several questions arising on the record.

Defendants in error have not furnished us with any brief, nor made any oral argument.

We can therefore determine their position only from the the pleadings, and evidence offered in support thereof.

The first question presented by the plaintiff in error is whether the railroad company sustained the relation of a common carrier to the plaintiff, and is therefore liable for the loss of baggage stolen without any claim of negligence on its part.

It appears in this case that the baggage room at the depot in Winfield was broken into on the night of December 24th,

and this roll of cutlery and other property, some of it belonging to the baggage master, was stolen. Personal baggage limited in quantity is usually transported by carriers of passengers as an incident to the transportation of the person, without

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extra charge. The contract to transport a passenger is usually a personal contract. If injury results to his person, or his personal effects transported as baggage, there can be doubt that the railroad company is liable to him, and him alone, when occurring under such circumstances as to create liability. The fact that he is engaged in the service of another at the time, and that his transportation is paid for by his employer, cannot diminish his individual right to safe transportation. We fail to perceive that the facts that his fare is paid for by his employer, and that the occasion for his making the journey is the prosecution of the business of his employer, in any manner affect the contract with, or liability of, the railroad company. It does not appear in this case that, at the time he purchased his ticket, anything was said with reference to his employment, nor that, at the time he checked his baggage, any mention was made of the fact that the samples he carried belonged to the plaintiffs.

In Hutchinson on Carriers (section 701) the author says:

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“The owner of the property must of course stand in the relation of passenger to the carrier, in order to fix upon him the liability as a carrier of baggage. The carriage is *ex vi termini* incidental to the carriage of the owner as a passenger. If, therefore, that which would have been properly baggage had it been accompanied by the owner as a passenger should, by accident or mistake, be accepted by the carrier for transportation without being accompanied by the owner, and when he is not, and does not become a passenger, the carrier would not have it in his custody in the character of baggage, and would not be responsible for it as such.”

In *Metz v. Railroad Co.*, (Cal.) 24 Pac. 610, it was held “that a man travelling alone, and carrying in his trunk for transportation a quantity of ladies’ jewelry, cannot recover for the loss thereof against a common carrier.” This case was decided on the ground that these articles were not properly baggage for the convenience of the passenger, but were merchandise, though not carried for any commercial purpose, and not such as a carrier was under obligation to transport as baggage.

In *Stimson v. Railroad Co.*, 98 Mass. 83, it was held “that a railroad company is not liable to either owner or agent, on its ordinary contract of transportation of a passenger, for losing a valise delivered into its charge as his personal luggage, but which contained only samples of merchandise, and that its contents were owned by a trader, whose agent he was to sell such goods by sample, nor in tort for the loss, without proof of gross negligence;” and the case of *Alling v. Railroad Co.*, 126 Mass. 121, is to the same effect.

The case of *Humphreys v. Perry*, 148 U. S. 627, goes still further. The plaintiffs were partners, dealing in jewelry. One of the firm, who acted as a travelling salesman, purchased a ticket, and checked a dark-colored, iron-bound trunk, of the kind known as a “jeweler’s trunk,” and paid the charge for overweight thereon as personal baggage. There was no evidence tending to show that the company’s agent had any knowledge of the contents of the trunk. The court held, after an elaborate review of the authorities, that there was no liability. In the case under consideration we are not required to go to the limit of the one last cited, nor do we need to assent to the conclusion arrived at in that case. Here there is absolutely nothing showing any contract, express or implied,

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between the parties to this suit, with reference to the transportation of the stolen property. The bill of particulars seems to base the plaintiff's right to recovery solely on contract. There is no averment of loss through negligence or of wrongful conversion of the property.

Several other questions are discussed in the brief of counsel for the plaintiff in error, but, as the point already considered disposes of the case, we deem it unnecessary to consider any other matter.

The judgment is reversed.

All the justices concurring.

MEUX

v.

GREAT EASTERN RAILWAY CO.

([1895] 2 Q. B. 387.)

Liability of Company for Loss of Servant's Luggage Containing Master's Property.—A servant of the plaintiff took a ticket for a journey on the defendant's railway, and a portmanteau of his was accepted by the defendants as his personal luggage. The portmanteau contained his livery, which was the property of the plaintiff. Through an act of misfeasance of a porter in the employment of the defendants, the livery was destroyed. In an action to recover the value of the goods destroyed, *Held*, that the defendants were liable to the plaintiff for the tortious act of their servant in injuring the plaintiff's property. (*Pages 456, 458, 468.*)

APPEAL from the judgment of MATHEW, J., at the trial without a jury.

The action was brought to recover the value of a servant's livery under the following circumstances. The plaintiff directed her servant to travel by the defendant's line from a station in the country to London. He went to the station with a portmanteau, in which was his livery, which belonged to the plaintiff. At the station he took his ticket, which he paid for with money supplied to him by the plaintiff. The portmanteau (as appeared by admissions made in the case) was handed into the custody of the defendant's servants, to be carried by them to town as passenger's

Case stated.

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luggage, and was overturned in front of a train by one of the defendant's servants, and was damaged and became useless to the plaintiff.

The learned judge decided that the plaintiff could not recover in contract, as the contract made by the defendants was a personal contract with the servant, and that she could not recover in tort because the goods were not lawfully on the premises of the defendants.

Judgment was accordingly given for the defendants.

The plaintiff appealed.

J. Alderson Foote, for the plaintiff.

The plaintiff is entitled to maintain the action, first, on the ground of tort: and, secondly, on the ground of contract. If the railway company by misfeasance damage goods which are lawfully on their premises, they are liable to the owner of the goods as for a tort. According to *Claridge v. South Staffordshire Tramway Co.*, (1892) 1 Q. B. 422, where goods have been bailed, the bailee cannot recover for injury to them unless he is liable over to the bailor, and therefore the latter must be entitled to sue. The learned judge seems to have thought that the goods were delivered to the defendants, not as being the personal luggage, but as the property of the servant, and so were not lawfully on the defendant's premises. This is a misconception, for they were delivered as the personal luggage of the servant, and no representation was made as to whose property they were—a fact that was immaterial. If *Claridge v. South Staffordshire Tramway Co.*, (1892) 1 Q. B. 422, was wrongly decided, and the bailee can sue as trustee for the bailor, it is contended that since the Judicature Acts the plaintiff, as the person really interested, can also sue. It is not a question of knowledge on the part of the defendants, for goods, or, as in *Austin v. Great Western Ry. Co.*, L. R. 2 Q. B. 442, a child may be lawfully on the company's premises without their knowledge, so as to make them liable, if there is no fraud or intention to deceive. In *Becher v. Great Eastern Ry. Co.*, L. R. 5 Q. B. 241, which was relied on by the defendants, the portmanteau carried by the servant was not his personal luggage.

The duty owed by the company to the plaintiff is that indicated by *BRAMWELL, B.*, in *Hayn v. Culliford*, 4 C. P.

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D. 182, which had been recognized in *Marshall v. York, Newcastle & Berwick Ry. Co.*, 11 C. B. 655, and *Martin v. Great Indian Peninsular Ry. Co.*, L. R. 3 Ex. 9.

As to the question of contract, it may be contended that the servant taking his ticket with the money of his mistress acted as her agent, and that she can sue on the contract made by him.

Jelf, Q. C., and *Collier*, for the defendants.

There was no contract with the plaintiff, and she cannot sue for breach of that made with her servant. The only obligation of the company in respect of this luggage arose out of the contract made with the servant. In effect it was, so far as related to the luggage, a contract of insurance of his property carried as personal luggage, and the company are under no obligation to any one but him for any tortious act of their servants which damages the property of which they have charge. In fact, there has been only a non-feasance in not taking sufficient care of the portmanteau; and if the plaintiff can recover at all it must be in respect of some active negligence amounting to a misfeasance. *Becher v. Great Eastern Ry. Co.*, L. R. 5 Q. B. 241, and *Alton v. Midland Ry. Co.*, 19 C. B. (N. S.) 213; 34 L. J. (C.P.), 292 are entirely in the defendants' favor. [They cited also *Great Northern Ry. Co. v. Shepherd*, 21 L. J. (Ex.) 114, and *Great Western Ry. Co. v. Bunch*, 13 App. Cas. 31.]

LORD ESHER, M. R.—In this case the plaintiff has brought an action against the defendants on the ground that property belonging to her had been injured by the negligence of their servant. The property was in a portmanteau, which

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was taken by one of the defendants' servants for the purpose of its being placed in a train, and it was said that owing to his carelessness it was allowed to fall on the line so that it was run over by a train and the goods in it were destroyed. It is suggested that there was no evidence that the man was carrying the portmanteau carelessly; but it is not usual for porters to let things fall on the line, and unless there were some explanation of how it had happened any one would say that there was negligence, and we ought so to find. That being so, the plaintiff says there

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was a wrongful act of the defendants with regard to her property, and that she has a right to recover damages. The answer given is that the portmanteau was brought to the station by a servant of the plaintiff, who took a ticket and gave the portmanteau to be carried by the porter as personal luggage under the contract made personally by the plaintiff's servant with the defendants. It is said, therefore, that as the plaintiff was no party to the contract there could be no breach of contract so far as she is concerned. That is quite true where the goods are the personal luggage of the servant and are accepted as such, though it would not apply where a servant is sent with luggage to be forwarded which is paid for and not taken as his personal luggage. In such a case the servant would be making a contract on behalf of his master, who could adopt what was done and sue for breach of contract.

There being no contract in this case with the plaintiff, she gets no right to sue for a breach of the contract which was made, and there is no duty towards her arising on contract. There is nothing in such a state of things that deprives the plaintiff of a right which she has independently of contract, and which she would have even if there were no contract. If goods were put on the premises of the defendants or in a van without any knowledge on their part, they would not be bound to take notice that the goods were there. If they are put openly on the platform, to be carried by the company, they know that the goods are there; they allow them to be there; and it must be a wrongful act for them to deal negligently with them. If they authorize their servants to take luggage up and carry it, the servants must do so with reasonable care, and for any active wrongful act on their part the company are liable. They cannot say that it was done without their authority; and, therefore, for such wrongful act the person injured has a right of action against them, although as between him and them there was no contract, and although there was a contract between them and some one else with regard to the luggage. It seems to me that the authorities bind us on this point; but even if they did not, I entirely agree with the view expressed by BRAMWELL, B., in *Hayn v. Culliford*, 4 C. P. D. 182. There goods were lawfully with the defendants' license on their ship, and they so tortiously dealt with the goods that they were injured. The learned judge first dealt with the case of a contract, and then said:

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“So also if there is not”—that is, if there is not a contract. “For if so, the case is this: The goods were lawfully with the defendants’ license in their ship, and they tortiously so dealt with them that the goods were injured.” The proposition would have been equally good if the word “lawfully” had been omitted, and that word is only inserted to contrast with what follows. He points out that the negligent act of the defendants was wrongful, “not as a breach of contract, but as a wrongful act in itself.” He was dealing, not with an omission to do something, or with mere non-feasance, but with misfeasance, and he pronounces such a misfeasance to be an act wrongful in itself. The same principle is to be found in the judgment of the same learned judge in *Foulkes v. Metropolitan District Ry. Co.*, 5 C. P. D. 157., in which he says there may be no duty by contract, and consequently no cause of action for a non-feasance, but that there was a duty imposed by the law to do no act to injure another. These are authorities which seem to me to be sufficient for the determination of this case, and I think that principle goes with authority.

I cannot think that the case of *Alton v. Midland Ry. Co.*, 19 C. B. (N.S.) 213, 34 L. J. (C.P.) 292, touches the present one. It was decided on demurrer on an averment that the action was founded on contract; and that was the basis of the decision, which was that such right founded on contract was not made out.

In this case the evidence is clear that the property belonged to the plaintiff; and, for the reasons I have given, I think she was entitled to succeed.

The appeal must, therefore, be allowed.

Opinion of Kay, L.J. KAY, L.J.—In this case the plaintiff’s servant was about to travel on the defendants’ line, and he took to the station a portmanteau apparently belonging to himself, and containing livery which was the property of the plaintiff. The livery was damaged, and in respect of such damage this action is brought. It was damaged by an act described in the admissions in the following terms: “The property was overturned in front of the train by one of the defendants’ servants, and the same was destroyed and became useless to the plaintiff.” It is quite plain that there was an act, not of omission but of commission, which was negligent and improper, and which caused the destruction of these things.

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The law as to such a state of things has been summed up in *Taylor v. Manchester, Sheffield and Lincolnshire Ry. Co.*, (1895) 1 Q. B. 134. That was an action for personal injuries to the plaintiff, and the general doctrine is stated thus by LINDLEY, L. J., (1895) 1 Q. B. 134, at p. 138: "It appears to me that this is an action founded on tort, and the conclusion to which I have arrived is based upon the following reasons. That which caused the injury was not an act of omission, it was not a mere non-feasance; it was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance—it was positive negligence in jamming his hand. Contract or no contract, he could maintain an action for that. All that the plaintiff would have to prove in such a case would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case." A. L. SMITH, L. J., expressed himself to the same effect, (1895) 1 Q. B. 134, at p. 140, that "It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained whilst there by reason of the active negligence of the company's servants, whether he has a contract with the company or not." To apply that case to the present one—Were these goods lawfully on the premises of the defendants? They were in the portmanteau of the servant, and they were his livery which he was accustomed to wear. He was about to travel as a passenger, and the portmanteau was accepted as his personal luggage, which the company were engaged to carry for him, receiving no payment except for the ticket which he took for himself. It seems to me impossible under these circumstances to say that the livery was not lawfully on the company's premises. I think the test is this. Supposing the company had known that the portmanteau contained the servant's livery, could they have said they would not carry it as personal luggage? It seems to me quite plain that they could not have said anything of the kind, and in that respect the case differs from that of luggage containing goods belonging to other people in which the person who is carrying them as his personal luggage has no kind of interest. The learned judge came to the conclusion that the goods were not lawfully on the company's premises; but on this matter, on which his decision as to this part of the case seems to have been founded, I cannot agree with his view. I am not going

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to give any opinion upon the question whether, if the goods had not belonged to the servant at all but to some one else, and were in his portmanteau, they would have been lawfully upon the premises of the company. It seems to me, I must confess, a strong proposition to say that, where the company make no inquiry as to what is in the portmanteau, but accept it as personal luggage, they should be able to turn round and say, "The goods were not yours." However, on that point I give no opinion at the present time, because there seems to be some authority in a sense opposite to the view which I have indicated. In this case it seems to me quite impossible to say that the goods were not properly treated by the servant as being his personal luggage and were not lawfully on the defendants' premises. If they were lawfully there and were injured by an act of misfeasance, the authorities seem quite clear that the owner of the goods has a right to sue for damages for the injury caused by the tortious act of the servants of the company.

A. L. SMITH, L.J.—I also am of opinion that this judgment cannot be supported.

The facts lie in the smallest compass. The plaintiff's footman was sent to London by his mistress, who gave him the money for his fare. He took in a portmanteau his livery, which was the property of the plaintiff. It was received as passenger's luggage, which in fact it was. It did not render it any the less the luggage of the footman because the property in the clothes still remained in the plaintiff. The livery was damaged by the active negligence of the company's servant, and the plaintiff seeks to recover in respect of this damage.

I am not going to decide as to what cause of action the footman might have, and what damages he could recover. The case of *Claridge v. South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, which bears on this point, may possibly require at some future time further consideration. Of this I am clear, that in the circumstances of this case the footman who had taken the ticket could have sued the company either on contract or in tort, but what damages he could have recovered it is not necessary to discuss. The question before us is whether the plaintiff can sue. She has incurred loss by reason of her property having been destroyed by the active

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Smith, L.J.

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negligence of the servants of the company while it was lawfully on the premises of the company: she has therefore a right of action in tort wholly irrespective of contract. Her goods were lawfully on the defendant's premises, and by their active negligence those goods have been damaged. That gives her a good cause of action in tort. The only answer given is that *Alton v. Midland Ry. Co.*, 19 C. B. (N. S.) 213, 34 L. J. (C. P.) 292, has decided otherwise; but this is not so. I pointed out in *Taylor v. Manchester, Sheffield & Lincolnshire Ry. Co.*, [1895] 1 Q. B. 134, that when the former case is looked into it appears that the sole point which was decided was on demurrer, which raised the question whether, the servant having contracted with the railway company to be safely and securely conveyed, the master could take advantage of that contract and sue for breach of it. That case is no authority for the proposition that the plaintiff cannot sue in tort irrespective of contract. There is plenty of authority on the other side: *Marshall v. York, Newcastle & Berwick Ry. Co.*, 11 C. B. 655; *Hayn v. Culliford*, 4 C. P. D. 182; *Foulkes v. Metropolitan District Ry. Co.*, 5 C. P. D. 157; *Taylor v. Manchester, Sheffield & Lincolnshire Ry. Co.*, [1895] 1 Q. B. 134, and *Kelly v. Metropolitan Ry. Co.*, [1895] 1 Q. B. 944, the bulk of the cases being in this court. It seems to me, therefore, that it is impossible to say on the facts of this case that the plaintiff has not a good cause of action against the company in tort. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Upton & Britton, solicitors for plaintiff.

E. Moore, solicitor for defendants.

ABSTRACTS OF RECENT DECISIONS

(1) **Baggage**—**Liability of Company for Loss of Jewelry In Trunk Received without Knowledge of its Contents.**—A trunk containing jewelry to the value of about \$2000 was checked by a passenger as baggage, its extra weight paid for, and was received by the company's agent without knowledge of its contents and placed by him in the baggage car. While in transit the car was derailed, and the trunk taking fire burst open and scattered its contents, which were in part recovered and delivered by the passenger to the conductor for transportation to the place to which the trunk had been checked. Upon

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their arrival at their destination, the passenger presented the check and asked for his baggage, without informing the agent at that point of the loss by fire, and subsequently the owners refused to accept the portion of the goods saved, unless without prejudice to their claim against the company for a loss. *Held*, that the railroad company was not liable for the loss of the goods as baggage, nor for a conversion of the goods, because refusing to deliver them upon condition. *Wunsch v. Southern Pac. R. Co.*, (U. S. Cir. Ct. N. D. Cal.) 62 Fed. Rep. 878.

The portion of the opinion bearing on the question in controversy is as follows:

"It is evident that under the decision of the supreme court of the United States in *Humphreys v. Perry*, 148 U. S. 627, the plaintiff's trunk and contents did not become baggage by its delivery by Eisenbach [plaintiff's travelling salesman] to the company's agent at Spokane. This is conceded by plaintiffs, but it is contended that there was a conversion by the defendant of the rescued articles by their nondelivery at Missoula on the demand of Eisenbach. To sustain this contention, plaintiffs cite a number of cases. There are various illustrations of the doctrine stated, in one of them (*Rider v. Edgar*, 54 Cal. 127) as follows:

"To maintain trover or trespass *de bonis asportatis*, evidence of an actual forcible dispossession of the plaintiff is not necessary. Any unlawful interference with the property, or exercise of dominion over it, by which the owner is damaged, is sufficient to maintain either action."

"In the case at bar there was no unlawful interference with plaintiff's property or exercise of dominion over it. The original delivery of the jewelry to defendant was a deception upon it (*Humphreys v. Perry*, *supra*), and gave no rights to the trunk and its contents as baggage. The first relations of defendant to them with which we are concerned accrued at Noxon, at the time of the wreck. What duty did these relations impose on the defendant? We may assume, to keep the goods safely, and to deliver them upon demand and identification to their owner. A discharge of this duty was tendered to plaintiffs, and refused by them. But it is claimed by plaintiffs that the goods were delivered to the conductor of the train by Eisenbach, he then saying that he was going to Missoula, and that this created a duty to deliver them at Missoula. If they had been baggage, property accompanying a passenger whose destination was Missoula, this might be true; but they were not. They were goods brought to the attention and forced upon the care of the defendant by an accident. They were of considerable value, and the true relations of the company to them were not known. But Eisenbach did not demand them at Missoula. They were on the same train as he was, and arrived at Missoula at the same time he did. If he had immediately sought and claimed them as such, a different question might have been presented. But his demand next day was not for them, but for the trunk and its contents as delivered at Spokane. Indeed, it is evident that, when he turned them over to the conductor, it was not for the purpose of claiming and receiving them again, for he testifies that he would not have accepted them if they had been offered. The testimony shows that to the first claim which identified them the company promptly responded, and subsequently tendered them, and that the plaintiffs refused to accept them except upon such terms as they had no right to exact."

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Same—What Constitutes Acceptance by Railroad Company of Bond for Permit to Check Jeweler's Sample Cases as Baggage.—A railroad company promulgated a rule for the government of its station agents and baggagemen, that jewelry sample cases should not be received or checked as baggage unless the owner presented a permit from the company, which permits were granted upon the applicant giving a bond indemnifying the company against loss in excess of \$50. *Held*, that where a bond had been tendered to the company and returned by it "for acknowledgment," there was not such an acceptance of the bond as would limit the liability of the company to the sum of \$50. *Weber Co. v. Chicago, St. P., M. & O. R. Co.*, (Iowa) 60 N. W. Rep. 637.

Same—Preclusion of Recovery for Loss of Jeweler's Sample Case by Knowledge of Rule Forbidding Receipt of Case without Special Permit.—If a person at the time of checking a jeweler's sample case as baggage knew of the existence of a rule forbidding baggagemen from receiving such cases without a special permit, or in the exercise of ordinary care, diligence, and intelligence should have known of such a rule, he is precluded from a recovery for the loss of such a case checked by him without a permit. *Weber Co. v. Chicago, St. P., M. & O. R. Co.*, (Iowa) 60 N. W. Rep. 637.

Same—Failure to Deliver Baggage on Demand—Subsequent Destruction by Fire—Liability of Company.—There being sufficient evidence to warrant the jury in believing that the agent of the defendant in charge of its baggage room refused to deliver the plaintiff's trunk to her upon demand for the same, on arrival at destination, and that he informed her it could not be delivered until the following morning, and the trunk having been destroyed by fire during the night, the following charge was warranted: "If the plaintiff demanded her baggage of the company immediately after reaching her destination, and the railroad refused to deliver until morning, and before morning the baggage was destroyed by fire, then, and in that event, you should find for the plaintiff." *Georgia Railroad & B. Co. v. Phillips*, (Ga.) 20 S. E. Rep. 646.

Actions for Injury to Baggage—Form of Action.—Where goods or other articles have been damaged by the negligence of a common carrier in their transportation, the owner thereof, accepting and retaining the same, may bring his action against the carrier to recover damages for the tort or wrong by which the goods were injured, but cannot maintain an action to recover, upon a verified account, for the value of the goods so injured. *Atchison, T. & S. F. R. Co. v. Wilkinson*, (Kan.) 39 Pac. Rep. 1043.

Same—Admissibility of Opinion Evidence as to Damages.—A witness ought not to be permitted to state what damages, in his opinion, the plaintiff ought to recover for the injury to or destruction of his goods or other property. *Atchison, T. & S. F. R. Co. v. Wilkinson*, (Kan.) 39 Pac. Rep. 1043.

Same—Admissibility of Evidence of Baggagemen—*Res Gestæ*.—In an

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action brought by a passenger against a railroad company to recover damages for injuries to a trunk carried on the train, the statements of the baggagemen, if they do not constitute a part of the *res gestae*, are not binding on the railroad company. *Atchison, T. & S. F. R. Co. v. Wilkinson*, (Kan.) 39 Pac. Rep. 1043.

Same—Sufficiency of Proof to Support Finding as to Knowledge of Rule Forbidding Checking of Jeweler's Sample Case without Permit.—In an action to recover the value of the contents of a sample jewelry case delivered to a railroad company for transportation, it appeared that the company had in force a rule prohibiting the receipt of such cases by its baggagemen unless a permit from the company was produced. *Held*, that a special finding that the plaintiff had no knowledge of such a rule was without support where it appeared that prior to the loss of the goods in question plaintiffs had corresponded with the company respecting the issuance of a permit. *Weber Co. v. Chicago, St. P., M. & O. R. Co.*, (Iowa) 60 N. W. 637.

Same—Liability of Company as Warehouseman—Burden of Proof as to Negligence—Instruction.—Where it very clearly appeared that the liability of a railroad company as a common carrier had ceased when baggage was destroyed by fire, and that it was liable only as a warehouseman for a want of ordinary care, it was error to instruct the jury that the burden was on the company to show that the property had not been lost or destroyed by its negligence. *Kahn v. Atlantic & N. C. R. Co.*, (N. C.) 20 S. E. Rep. 169. *Citing* *Hilliard v. Railroad Co.*, 6 Jones (N. C.) 343; *Neal v. Railroad Co.*, 8 Jones (N. C.) 482; *Chalk v. Railroad Co.*, 85 N. C. 433.

Same—Instruction Defining Ordinary Care.—In an action against a railroad company to recover the value of baggage lost by fire while in its custody, it is erroneous to leave the question of ordinary care on the part of the company to be determined on an instruction that "ordinary care is such care as an ordinarily prudent man would have used in the protection of his own property." *Kahn v. Atlantic & N. C. R. Co.*, (N. C.) 20 S. E. Rep. 169.

PULLMAN'S PALACE-CAR CO.

v.

MARTIN (Elise C.).

(*Supreme Court of Georgia, Jan. 28, 1895.*)

Loss of Property by Passenger in Sleeping-car—Liability of Company [(1) p. 479].—A sleeping-car company is liable for moneys stolen by its employés and such articles as a passenger may choose to carry for convenience and adornment. (*Page 479.*)

ERROR to Savannah city court.

Barrow & Osborne and *Jackson & Leftwich*, for plaintiff in error.

W. D. Harden and *West & McLaws*, for defendant in error.

ATKINSON, J.—1. According to the view we take of the questions made in this case, it is unnecessary for us to determine whether in Georgia a sleeping-car company should be held to the same degree of diligence as is imposed upon an innkeeper, or whether it shall be adjudged to be a common carrier; nor is it necessary specially to define its appropriate position among that class of persons denominated “bailees for hire.” Whether we treat this defendant as a common carrier of passengers, or treat it as an innkeeper, or treat it as a simple lodging-house keeper, hiring its space, for an agreed consideration, for sleeping apartments for a determinate period, it would be responsible for personal jewels and belongings of a passenger, appropriate to his or her social position and financial standing, carried by such passenger while travelling thereon, and for his or her convenience, comfort, or personal adornment, to the extent, at least, of making good to such person any loss resulting from a theft of such property by its own employés while such person was under their protection. It guarantees, at least, that, while enjoying the comforts afforded by the car of the defendant, a person travelling thereon shall not be robbed by

Statement by
the court.

Sleeping car
Companies

Pullman's Palace-car Co. v. Martin

its employes. To what extent and under what circumstances it might be liable for the wrongdoing of other persons we do not think is involved in this case, and do not at present undertake to decide.

By her declaration the plaintiff alleged that on or about March 2, 1892, she was a passenger for hire on defendant's sleeping-car "America" from Chattanooga to Macon; that

The declaration. by the contract of hiring it undertook to use reasonable and proper diligence in guarding and

protecting her from loss by theft while she slept, during the usual hours of sleep, in the berth assigned to her on the car by defendant; that she had with her reasonable money and jewelry, to wit, money to the amount of \$35 and jewelry to the value of \$700; that, upon retiring for the night upon the sleeper, she put the money and jewelry in a satchel and placed the satchel between her person as she lay in her berth and the wall of the car, and then went to sleep; that defendant so negligently guarded and protected her while she was thus sleeping that, through its negligence, some person unknown to her, while she was asleep, and during the night, took the money and jewelry from the satchel, without her knowledge, and stole it, etc.

According to the evidence reported in the record, the plaintiff was a passenger upon defendant's car, and on the

The evidence. evening before she lost her property, in conversation with another passenger with whom she was travelling, she casually so exposed her pocketbook containing the money and jewelry sued for as that the porter of the car saw it in her possession, and saw her place it in a satchel. Upon retiring, this satchel was placed in the berth beside her, between herself and the wall of the car. She testified that she had not removed the pocketbook from the satchel, but, upon retiring, went to sleep, and so remained until the next morning, about daylight or before. That about this time she was awakened by a sensation as of some person intruding in her berth. That she awoke and recognized the head of the porter, a servant of the company, inside the curtain of her berth. That she asked what he meant, and, when ordered to close the curtain, he said he had come in to call her for breakfast at Macon, Ga. She, however, went to sleep again,—does not know how long she slept,—and then got up and dressed before she reached Macon. That when she finally

awoke the satchel was at her feet, and open. That she closed the satchel, and several hours thereafter reopened it, to get some money with which to purchase fruit, and found that the money and jewelry were gone. That she called the attention of the conductor to it, and search was made, but it was impossible to recover the money and jewelry. The conductor testified that both the porter and himself were on watch until all the berths were made down, which was about 10.30 P. M.; that the porter then retired, and he remained on watch until 3 A. M., at which time he awoke the porter, who went on watch, and he then retired; that he arose between 6.30 and 7 A. M.; that from the time the berths were made down until he retired he was constantly watching the aisle between the berths, to see that the occupants thereof were not disturbed in their persons or property while they slept; that the plaintiff arose about 7 o'clock, but did not report her loss until about 11.30 A. M.; that she did not say where her satchel had been during this interval, whether she had left it unguarded for all or any portion of the time or not.

The porter testified that he did not know anything of the earrings or money; that the conductor and himself were both on watch until the berths were made down, and then he went to bed, and the conductor remained on watch until 3 A. M.; that at that hour the conductor awoke him, and he stood watch alone until the passengers arose the next morning; that he kept a strict watch, did not go to sleep at any time, and was not out at any of the stations; that neither the plaintiff nor her property was interfered with by any one while he was on watch; that the other door was not locked, because it was not necessary, as he was on watch all the time, and could see it; that the car was an old one, and there was nothing to prevent him from seeing from one door to the other; that he did not go inside the curtain, nor put his head, his arms, or his shoulders inside the curtain, before the plaintiff got up; that he did not see her take her pocketbook out of her satchel at any time during the trip, or show her earrings or money to any one; that he remained on watch until the conductor and passengers got up in the morning, and then the conductor shared his watch; that he was in the car the entire time, but was in bed and asleep between 1 and 3 A. M.; that while on watch he was constantly awake and on duty, guarding the car, the property in it, and the passengers, and no one could

have disturbed the passengers or their property without his seeing it; that he blacked shoes that night at the end of the aisle, in the body of the car, where he had a full view through the aisle; that this was an old-style car, and had no smoking room in it; that in making down the berths he closed both sashes of the windows; that the windows all had fastenings, to prevent their being raised from the outside; that there was no conversation between the plaintiff and himself; that in waking the passengers, if she was not already up, he woke her in the same manner as he awoke other passengers, by calling, and, if no answer was made, by putting his hand on the berth curtains, and pushing them in until they touched her, so as to arouse her; that this was always the way passengers were waked up.

That this passenger lost her jewelry and money, and that she lost them while a passenger in this car, are both facts which may be taken as established beyond contro-

The evidence reviewed. versy by the evidence. The plaintiff's testimony places the porter, the servant of this defendant, in such a situation as that he might easily have purloined her property. According to his own statement, it was not necessary for him to have put his head inside her berth. According to her statement, he did put his head inside of her berth, and thereafter she found her satchel open and her purse gone. These circumstances, even in the face of a denial by the porter, would have furnished strong inferential evidence that he was the man who appropriated these goods. His guilt, we think, is practically demonstrated by his own testimony and that of the conductor. According to the conductor, he was constantly on guard from the time the passengers retired the evening before until 3 o'clock in the morning; and if his testimony be true—and it is not disputed by any one—it would have been impossible for any person without his knowledge to have intruded upon the privacy of this passenger during this interval, and stolen her property. According to the testimony of the porter, from 3 o'clock A. M. until the time when the passengers arose he was constantly on guard for the purpose of protecting the persons and property of the passengers against the depredations of other people; that he was in a position where he could have seen and would have seen any person who intruded upon the passengers in that car, and that no such thing was done. So

Abstracts of Recent Decisions *Sleeping-car Companies*

that, according to his own statement and the statement of the conductor, it would have been impossible for any person other than one of these two to have robbed this plaintiff between the hour when she retired and the hour when she arose. But since she was robbed, and since, as we have seen, it would have been impossible for any person other than one of these two to have robbed her, then the inference is that she was robbed by the one or the other of these employés; and for the larceny of either the company would be responsible.

We think the evidence of this plaintiff established beyond controversy that the porter intruded his head into her berth and stole her property. He was the person identified by the passenger as having intruded upon her privacy. According to his testimony, at the time she says it was done it would have been impossible for any person other than him to have entered unobserved. This was the view the jury might have taken of this case in the court below. The only reasonable conclusion to be drawn from this evidence is that the servant of the defendant, whose duty it was to guard the person and property of this passenger while she slept, purloined the chattels sued for; and we therefore think that, without reference to the liability imposed upon the company for injuries resulting from the negligence of its employés, the jury were justified in finding against it because of the larceny committed by its servants.

2. It is unnecessary to discuss further than is therein stated the question of practice referred to in the third headnote to this opinion.

Let the judgment of the court below be affirmed.

ABSTRACTS OF RECENT DECISIONS

(1) **Sleeping-car Companies—Duty of Company to Secure Safety of Money and Valuables of Sleeping Passengers.**—Relatively to a passenger occupying a berth in a sleeping-car, for which he has paid the customary fare, a sleeping-car company is under the duty of maintaining such watch and guard while the passenger is sleeping as may be reasonably necessary to secure the safety of such money, jewels, and baggage as he may properly carry on his person or have in his possession while travelling in the car; and if, while he is asleep, such property is taken from his possession, the burden is upon the company of showing that the loss did not occur because of a failure upon

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the part of its employes to discharge this duty. *Kates v. Pullman Pal. C. Co. (Ga.) 23 S. E. Rep. 186.*

Same—Liability of Company for Property of Passenger Casually Left in Car.—Proper diligence on the part of a sleeping-car company towards one of its patrons involves the exercise of ordinary care in looking out for and taking care of such property as may by him be casually left in a car of the company upon his leaving it, and the restitution of the property to the owner, when ascertained; and where such property is actually found by the servants of the company, or is left or dropped in such place and under such circumstances as that, by the exercise of ordinary care, it ought to have been found by them, the company will be liable for its value. *Kates v. Pullman Pal. C. Co. (Ga.) 23 S. E. Rep. 186.*

Same—Negligent Acts of Passenger Caused by Wrongful Conduct of Company.—That the loss of property was occasioned through the negligence of the passenger would, ordinarily, be a good defense; but where it appears that the acts of the passenger alleged to be negligent were caused by the wrongful conduct of the company itself, the latter is estopped from claiming immunity because of such acts. *Kates v. Pullman Pal. C. Co., (Ga.) 23 S. E. Rep. 186.*

GULF, COLORADO & SANTA FÉ R. CO.

v.

STANLEY (J. E.).

(Supreme Court of Tennessee, Dec. 10, 1895.)

Right of Principal to Sue upon Contract for Carriage of Live Stock.—The principal in a contract for the shipment of live stock, whether disclosed or undisclosed, has the right to sue upon it. (*Page 483.*)

Deterioration of Stock in Course of Transportation by Negligence of Carrier—Measure of Damages.—The measure of damages of the shipper of cattle which, by the negligence of the carrier, have deteriorated in value, is the difference between the market price of the cattle when delivered at their destination and what their market price would have been had they been carefully cared for during the trip, although they were not shipped for immediate sale, but for pasturage and fattening before sale. (*Page 483.*)

Action for Breach of Contract of Carriage of Live Stock—Propriety of Instructions Limiting Damages.—A written contract for the carriage of live stock limited the liability of the company to its own line. In an action by the shipper for injury to the stock, the court instructed the jury generally that if they found that the parties had first made an oral

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contract and thereafter a written one, the latter would govern, and that if they found that the injury had occurred through the negligence of the company they should award damages according to a rule laid down in a special instruction to be given. The special instruction authorized a recovery for such injuries only as the cattle received on defendant's line, and no charge was given which warranted a more extended recovery. *Held*, that there was no error in refusing instructions limiting the damages to such as occurred while the stock was in the possession of the defendant company. (Page 484.)

Contract for Carriage of Live Stock [(1) p. 541]—**Reasonableness of Stipulation Requiring Notice of Injury to Stock before Removal from Station.**—A stipulation in a contract for the carriage of live stock, that as a condition precedent to a recovery for injury to the stock at any place where the same might be loaded or unloaded for any purpose, notice in writing should be given to the station-master specifying the nature of the claim, etc., before the removal of the stock from the station, is unreasonable, when it appears that although before reloading, the shipper knew that his cattle had been crowded in pens and had suffered for the want of food and water, yet he did not know the extent of his damages, and at most could have made only a vague complaint. (Page 484.)

Same—Reasonableness of Stipulation Requiring Action to be Brought Within 40 Days after Injury.—A stipulation that the right to recover for the breach of a contract to carry live stock should be barred unless an action be commenced and a citation served within 40 days next after the loss or damage shall have occurred, is unreasonable. (Page 485.)

ERROR to court of civil appeals of Third supreme judicial district. *Affirmed*.

J. W. Terry and Chas. K. Lee, for plaintiff in error.

Browning & Matthews, for defendant in error.

GAINES, C.J.—The suit was brought by defendant in error to recover of plaintiff in error damages for alleged injuries to cattle transported for him over the line of the company and that of the Atchison, Topeka & Santa Fé Railway Company. The time at our disposal precludes us from considering in detail, in this opinion, all the points raised by the numerous assignments in the court of civil appeals, all of which are insisted upon in this court. We will therefore confine our discussion to a few of the more prominent questions presented in the petition for the writ of error. Case stated.

The plaintiff in the district court testified, upon the trial, that he applied to the agent of the defendant company at Lampasas, in this state, for transportation of a herd of cattle from that point to Elgin, Kan.; that the agent agreed to furnish the cars for the carriage of the cattle, and to transport them to their destination at the rate Facts.

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of \$50 per car; that, when the cattle reached the station, it was found necessary to employ two separate trains of cars for their transportation; that he took charge of the cattle on the first train, and that he placed one Harmon, as agent, in charge of those upon the other. The defendant company's line reached only to Purcell, in the Indian Territory, where it connected with the Atchison, Topeka & Santa Fé Railway, which led to Elgin, the point of destination of the cattle.

The plaintiff further testified, in effect, that, with the exception of a delay of a few hours, and a resultant delay in feeding and watering, the cattle reached Purcell, the point of connection, in good condition, but that, at that point, they were taken off the cars and crowded together in muddy pens, in such numbers that it was impossible for them to take sufficient food and water, and that, in consequence of this treatment, some of them died on the route to Elgin and after reaching there, and the others were greatly injured and deteriorated in value. He further testified that, after the cattle of which he took charge were loaded upon the train at Lampasas, and the train was about to start, upon the demand of the conductor he signed a contract of shipment which he did not have time to read. Harmon, his agent, also testified that, just before the train which he accompanied left, he also signed a contract, but that he had no authority from his principal to alter the contract previously made with the agent of the company. The contracts themselves were signed by the agent of the company, and by Hughes & Rathmell, to whom the cattle were consigned for pasturage. The names of the plaintiff and of Harmon appeared signed only to the drover's passes, which were a part of the contracts. It therefore seems that the plaintiff's and Harmon's testimony referred to these latter signatures.

The agent of the company also testified as to the transaction between him and the plaintiff, but did not deny either the agreement to furnish the transportation or the rate which was testified to by the plaintiff. Hughes & Rathmell were the plaintiff's agents, and the contracts were both signed in their name. The company's agent testified that, when the contract was made for the shipment, Hughes, a member of the firm of Hughes & Rathmell, was present and participated in the conversation, and that he did not know that the cattle belonged to plaintiff. The undisputed evidence showed that

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Action for
Deterioration

the cattle belonged to plaintiff, and that they were shipped for his benefit.

It is not important whether the agent knew for whom the cattle were shipped or not, for the principal in the contract, whether disclosed or undisclosed, had the right to sue upon it. *Heffron v. Pollard*, 73 Tex. 96.

Sued by principal upon contract for carriage of live stock.

A careful consideration of the evidence as to the amount of damages satisfies us that it was sufficient to sustain the verdict in that respect.

It is insisted, however, that, since the testimony showed that the cattle were not shipped for immediate sale, but were to be put upon pastures, and fattened, and then sold, the court erred in charging the jury that the measure of the plaintiff's damages was the difference between the market price of the cattle in the condition in which they were delivered at Elgin, and what their market price would have been at that place had they been carefully cared for during the trip, and that it also erred in refusing a charge to the effect that the plaintiff was entitled only to recover the amount of the additional expense to which he was subjected, by reason of their injuries, in preparing them for market. We think the court gave the correct measure of damages. That the rule laid down is the ordinary rule in such cases is well settled in this state and in other jurisdictions. We see nothing in this case to take it out of the ordinary rule.

Deterioration of stock during transportation — Measure of damages.

In a case strikingly like this, the supreme court of the United States say: "The difference between the market value of the cattle in the condition in which they would have arrived but for the negligence of the defendant, and their market value in the condition in which, by reason of the negligence, they did arrive, constituted the proper rule of damages. It was not material whether the plaintiffs intended to keep the cattle upon their farms, for breeding purposes, or to sell them upon the market. The depreciation in value of the cattle was the same in either case." *Railway Co. v. Estill*, 147 U. S. 591, 54 Am. & Eng. R. Cas. 486.

We think it true that, as to the damages for injuries to personal property resulting from a wrong of a defendant, no rule can be laid down which is applicable to every case. In each case that rule will be adopted which will lead to the most

Notice of Injury

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accurate result. Here the cattle, in their injured condition, had a market value at Elgin. They would have had a value in the market if they had arrived uninjured. The difference in that value, if correctly determined, furnishes a safe and certain criterion of the loss. It is true that value is a matter of opinion, and that testimony as to value in such a case may be somewhat speculative and unsatisfactory; but we do not see that the rule insisted upon by plaintiff in error would have led to a more satisfactory result. *Railway Co. v. Estill, supra.* From a logical standpoint, the rule of the difference in market value is also the correct one. To make the plaintiff whole he should recover a sufficient sum to enable him to sell the injured property and to replace it with that which is uninjured, without loss.

The written contract contained stipulations limiting the company's liability to its own line. The judge, in his general charge, instructed the jury, in effect, that, if they found that the parties had first made an oral contract, and then entered into a written contract for the transportation of the cattle, the latter would govern, and that, if they found that the cattle had been injured during the transportation through the negligence of the defendant, they would award the plaintiff damages according to the rule laid down in a special instruction to be given. The special instruction authorized a recovery for such injuries only as the cattle received while on defendant's own line. No charge was given which warranted a more extended recovery. Hence the court was not in error in refusing charges limiting the damages to such as occurred while the cattle were in the possession of the defendant company.

The written contract also contained the following stipulations: "Ninth. That, for the considerations aforesaid, said shipper further agrees that, as a condition precedent to his right to recover any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the company's road, or previous to loading thereof for shipment, he, they, or his or their agents, in charge of the stock, will give notice in writing of his claim therefor, specifying the nature of the claim, to its station master at said last-named station on the company's road, before said stock is removed

Propriety of
instructions
limiting
damages.

Reasonableness
of stipulation
as to notice of
injury.

from said station, and before the same shall have been removed, slaughtered, or intermingled with other stock, and will not move said stock from said station until the expiration of three hours after the giving of such notice, to the end that such claim may be fully and fairly investigated; and that a failure to comply with the terms of this clause shall be a complete bar to any recovery of any and all such damages. The written notice herein provided for cannot and shall not be waived by any person except such station master, and by him only in writing.

“Tenth. And it is furthermore hereby expressly provided and mutually agreed that no suit or action against the company for the recovery of any claim by virtue of this contract, or for loss or damage to said stock, or decrease in the market value thereof, from delay or any other cause, while in transportation or at stations on the company’s road, or for breach of any alleged contract, concerning the shipment of said stock or the furnishing of cars, made before the receipt of the stock by the company, or before the execution hereof, or on account of the breach of any written or verbal agreement or contract whatever, concerning said stock, prior to the execution hereof, shall be sustained in any court of law or chancery, unless such suit or action shall be commenced and citation served within 40 days next after the loss or damage shall have occurred; and should any suit or action be commenced against the company after the expiration of the aforesaid 40 days, the lapse of time shall be taken and deemed conclusive evidence against the validity of such claim or cause of action, and shall be a full and complete bar to such suit, any statute of limitations to the contrary notwithstanding.”

Reasonableness
of stipulation
limiting time
for bringing
action.

In view of the testimony and the findings of the court of civil appeals, we cannot say that no other conclusion was authorized than that the written contracts were executed without consideration. If, after the cattle were placed upon the train, the plaintiff and his agent had signed them without knowing their contents, and without any new consideration, it may be that they should have been held void. *Railway Co. v. McCarty*, 82 Tex. 613. But, since they were signed by Hughes & Rathmell, who, as the plaintiff himself testified, were authorized to do so, and since it does not appear when and under what circumstances they so signed, it cannot be

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said that they were executed without consideration. It is evident that the trial court was of opinion that, at least, the jury were authorized to find that the oral agreements were supplanted by the written contracts. The plaintiff admitted in his testimony that no notice was given to the agent of the company at Purcell of the damages to the cattle, and it appears clearly, from the evidence, that the suit was not brought within 40 days from the time of the breach of the contract. The defendant, by counsel, asked the court to charge the jury that, if the notice was not given, the plaintiff could not recover, and also, in effect, that, if the suit was not instituted within 40 days from the time the cause of action accrued, it was not bound. Both of these charges were refused, and their refusal brings up the question as to the validity of the two stipulations in the contract which have been quoted.

A stipulation of the character of these in question, to be valid, must be reasonable. At the time the cattle were reshipped at Purcell, the plaintiff, according to his own testimony, knew that his cattle had been crowded in pens, and had suffered for the want of food and water, but did not know the extent of his damages. Under the circumstances, he

could, at most, have made only a vague complaint, which would have subserved no useful purpose to either party. It was by no means certain that any serious loss would ensue, and, if the contract is to be construed as requiring notice in such a case, we think it must be held unreasonable.

Whether the stipulation as to the time in which suit should be brought, and the citation served, is reasonable or not, is not an open question in this court. It was held to be unreasonable in the case of this same company against Hume Bros., 87 Tex. 211.

We find no error in the judgments of the district court or of the court of civil appeals, and they are affirmed.

HOUSTON & TEXAS CENTRAL R. CO. *et al.*

v.

DAVIS (W. O.).

(*Court of Civil Appeals of Texas, June 5, 1895.*)

Contract for Carriage of Live Stock [(1) p. 541].—Validity of Requirement that Notice of Loss be Given before Removal of Stock from Station.—A contract for the carriage of live stock, which requires notice of injury to such stock to be given before it "is removed from the station," is violative of Laws 1891, ch. 17, p. 20, providing that to be valid such a contract must not require notice to be given in less than 90 days from the time of the injury. (*Page 489.*)

Same—Interstate Shipment—Necessity that Requirement of Notice of Injury should be Reasonable—Burden of Proof of Reasonableness.—A stipulation in a foreign bill of lading evidencing a contract of interstate shipment requiring written notice of injury to the shipment as a condition to a recovery of damages must be reasonable, and in an action for damages the burden is upon the railroad company to show its reasonableness. (*Page 489.*)

Same—Same—Requirement of Notice of Full Amount of Loss before Removal of Stock from Station.—A contract for the carriage of live stock which requires as a condition precedent to a recovery for injury to the stock, that notice in writing of the claim shall be given to the station agent of the carrier and of the full amount of such loss or damage, before the stock is removed from the station, is unreasonable, when the claim is for injuries to horses by fire, and the full extent of the injury does not develop until after the time within which, by the contract, the notice is required to be given. (*Page 490.*)

Same—Validity of Stipulation Fixing Value of Stock at Place of Shipment as Basis of Damages.—Where a railroad company is not deceived as to the character and value of live stock received by it for shipment, a stipulation fixing the value of the stock at the place of shipment, as a basis for the measure of damages, is not binding upon the shipper, who may prove the value at the point of destination. (*Page 492.*)

Same—Right of Company to Relieve Itself from Consequences of Its Own Negligence [(2) p. 682].—A railroad company cannot by contract relieve itself from liability for damages to live stock received by it for carriage, and caused by fire resulting from its own negligence. (*Page 492.*)

APPEAL from Travis county district court. *Affirmed.*

Appellee sued the Houston & Texas Central and the Austin & Northwestern Railroad Companies to recover damages for injuries to 25 head of horses, 2 tons of hay, 1 saddle, 1 bridle, 1 blanket, and 1 pair of spurs. He alleged in his petition that the defendants were partners; that

Case stated.

Notice of Loss

Houston & T. C. R. Co. v. Davis

he delivered the property to the Austin & Northwestern Railroad at Marble Falls, Tex., for shipment to Willacootchie, Ga.; that while the same was on the line of the Houston & Texas Central Railroad at or near Manor, Texas, the car containing said property caught on fire from sparks and cinders which appellant negligently permitted to escape from its engine, etc.

Both defendants denied under oath the partnership pleaded by the plaintiff, and, among other things, pleaded a written contract of shipment, and the Austin & Northwestern Railroad Company asked, in the event of a recovery against it, for judgment over against its codefendant.

The court sustained exceptions to so much of appellant's answer as set up several provisions of the written contract.

The case was tried without a jury, and judgment rendered for the plaintiff against both defendants for \$1,645, and protecting the Austin & Northwestern Railroad Company as asked in its pleadings. The Houston & Texas Central Railroad Company has appealed.

The court below filed no conclusions of fact and law, but the judgment rendered involves the following findings of fact, which find support in the evidence, and are therefore adopted by this court:

(1) Under the written contract attached to the answer of the Houston & Texas Central Railroad Company, the plaintiff shipped 50 head of horses and the other property described in his petition at Marble Falls, Tex., a station on the Austin & Northwestern Railroad. Said contract was made with the Austin & Northwestern Railroad Company, and the Houston & Texas Central Railroad Company was not shown to be a party thereto, as partner or otherwise.

(2) At Austin, Tex., said property was delivered, in good condition, by the Austin & Northwestern Railroad Company to the Houston & Texas Central Railroad Company. Near Manor, Tex., while in the custody of the latter company, and by sparks negligently permitted to escape from its engine, some hay (intended as feed for the horses) in one of the cars containing said shipment was set on fire, and the plaintiff's horses, etc., injured as alleged, to the extent of the amount recovered.

(3) That the plaintiff and his employes were not shown to have been guilty of contributory negligence.

Houston & T. C. R. Co. v. Davis

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O. T. Holt, for appellant.

R. H. Ward and *R. E. Crawford*, for appellee.

KEY, J. (after the foregoing statement).—1. The seventh and ninth paragraphs of the contract under which the property was shipped read as follows: “Seventh. And the party of the second part further agrees that, as a condition precedent to his right to recover any damages for any loss or injury to said stock, he, or his agent, the person in charge of said stock, shall give notice in writing of his claim therefor, and the full amount of such loss or damage, to the station agent of the party of the first part at the station hereinbefore named as the end of the line of the party of the first part, before said stock is removed from the station, and before said stock is mingled with other stock, or delivered to any connecting line or railroad.”

Validity of
requirement
of notice of
loss.

“Ninth. It is further expressly agreed by the party of the second part that the other railway lines over which said stock are waybilled, in order to reach their destination, having participated in making said through rate of freight, of which the party of the second part has the benefit hereunder, when they receive said stock for transportation, under this contract, shall, like the party of the first part, not be responsible for injuries or loss occurring beyond their respective lines of road, and shall be entitled to same notice of loss or damage occurring upon their respective lines, as herein provided for party of the first part, to be given to the agent of each railway company at the station ending the run of said stock over such road.”

Appellant pleaded that it had a station agent at Manor, named T. H. Barrow, and one at Houston, named J. T. Bell, at the time of the accident in question; that Houston was the terminus of its road; that the plaintiff failed to give written notice of the damages to his property to either of said agents, or to any other person representing appellant; and it is urged that, under these circumstances, the provisions of the contract, as above set out, are binding on appellee, and defeat his claim for damages. If the contract in question is not a contract for an interstate shipment, it is subject to, and controlled by, the second section of chapter 17 of the acts of the Twenty-second Legislature (Gen. Laws, p. 20), which declares void any stipulation

Reasonable-
ness of notice.

in a contract which requires such notice as is now under consideration to be given, "at a less period than ninety days." The same section provides that when such notice is required it shall be presumed that it has been given, unless the want of notice is pleaded under oath. Construing this statute, this court held, in *Telephone Co. v. Seiders*, (Tex. Civ. App.) 29 S. W. 258, that, in the absence of a sworn plea of failure to give notice, it must be conclusively presumed that notice was given; and, as the supreme court refused to grant a writ of error in that case, we presume that our court indorses that construction of the statute. Appellant's plea of failure to give notice was not verified, as required by the statute. Besides, if the statute referred to applies to this contract, the contract is void, because it requires the notice to be given "before the stock is removed from the station," etc.; whereas, under the statute, a contract, to be valid must not require notice to be given in less than ninety days.

Tested by the rule announced in *Railway Co. v. Sherwood*, 84 Tex. 125, we doubt if this should be held to be a contract for interstate shipment. It not only limits the liability of the company making the contract, and those carrying the freight thereunder, to their own lines, but the obligation to carry is, "from the station where this contract is executed to Houston, Tex."; and it expressly stipulates, in the eighth paragraph, that the "party of the first part is only to transport said stock to the aforesaid station named at the end of its line on the route over which said stock is to be shipped." It is true that the contract states that the freight is waybilled through and consigned to C. L. Patton, at Willacootchie, Ga., and there is a statement in the eighth paragraph that the company making the contract will protect the through rate of freight "named herein." But it expressly states that the shipment is to be transported, in part, by other carriers, and in no place does it designate or fix a through rate of freight; and appellant did not allege or prove that such rate of freight was agreed upon. In the *Sherwood* case it is said to the opinion: "The bill introduced in evidence purports on its face to be a foreign bill of lading. It provides for the transportation by the Missouri Pacific Railway Company of the cotton at the rate of 136 cents per hundred pounds from Greenville, Tex., to Liverpool, England." And again it is said in the opinion: "Does the provision

Same—Notice
of full amount
of loss.

limiting the liability of the company to its own line terminating at Galveston so affect the character of the instrument as to make of it a domestic bill of lading? We think not. The instrument on its face purports to be a through bill of lading. It constitutes, as we view it, an undertaking on the part of the carrier defendant to transport and have transported from Greenville, Tex., to Liverpool, England, the cotton in question. It provides for a rate of freight between these points of 136 cents per hundred pounds. It contemplates a continuous transportation from Greenville, Tex., to Liverpool, England. These are all features of a through contract of shipment."

But if it be conceded that the instrument in question is a foreign bill of lading, evidencing a contract for an interstate shipment, and therefore not subject to the statute referred to, still the stipulation requiring written notice, as a condition precedent to a right to sue and recover damages, to be valid, must be reasonable; and the burden was upon appellant to allege and prove the facts and circumstances showing that the stipulation was reasonable. *Railway Co. v. Harris*, 67 Tex. 167, 28 Am. & Eng. R. Cas. 107; *Railway Co. v. Fagan*, 72 Tex. 132, 35 Am. & Eng. R. Cas. 666; *Railway Co. v. Greathouse*, 82 Tex. 104. Appellant attempted to do this by alleging that it had station agents, giving their names, at Manor, where the accident occurred, and at Houston, the terminus of its road, and that the plaintiff knew that it had such agents. These allegations were insufficient. The contract required the plaintiff, not only to give written notice of his claim for damages, but to state therein "the full amount of such loss or damage." The bulk of the property injured was horses. They were injured by fire; none were killed; and, in the very nature of things, it is not probable that the full amount of the "loss or damage" was ascertainable when they reached Houston, and it would be unreasonable to say that the plaintiff should have held them at that station until the full extent of the injury was developed. We therefore hold that the contract bore on its face *prima facie* evidence, at least, of its unreasonableness, and that nothing short of an affirmative showing by appellant that the full extent of the injury had been developed in time for appellee to have given notice thereof within the time required by the contract would relieve it from this objection. On this subject appellant's

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answer was silent, and therefore the court properly sustained appellee's exceptions to so much of it as pleaded appellee's failure to give notice of his claim. As a fact, the evidence tends to show that the full extent of the injury to the animals was not disclosed until after they left appellant's road. Speaking for himself alone, the writer of this opinion concurs in the doubt expressed by Judge Stayton in *Railway Co. v. Harris*, 67 Tex. 166, 28 Am. & Eng. R. Cas. 107, as to the validity of stipulations for notice in contracts by carriers, unless the name of the person to whom the notice is to be given is stated in the contract.

2. Appellant not having been deceived as to the character and value of the property it received for shipment, and the injury having resulted from its negligence, the stipulation in the contract fixing the value of the animals at Marble Falls, the place of shipment, as a basis for the measure of damages, was illegal, and not binding upon appellee; and the court did not err in allowing proof of value at the point of destination. *Railway Co. v. Maddox*, 75 Tex. 300; *Railway Co. v. Ball*, 80 Tex. 603.

3. The same principle applies as to the stipulation for non-liability in case of injury by fire. A common carrier cannot contract so as to relieve itself from liability for its own negligence; and, the fire in question having resulted from its negligence, appellant is not protected by the stipulation referred to. Appellant has pointed out no reversible error, and the judgment will be affirmed.

Affirmed.

REHEARING REFUSED.

The defendant, the Houston & Texas Central R. Co., thereafter moved for a rehearing, and the motion was overruled, the court declining to change or modify its views as expressed in the foregoing opinion. See *Houston & T. C. R. Co. v. Davis*, 32 S. W. Rep. 163.

Meuer v. Chicago, M. & St. P. Ry. Co. Limiting Liability

MEUER (Anton)

v.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO.

(Supreme Court of South Dakota, July 27, 1894.)

Construction of Contract made in one State for Transportation of Live Stock to another State—Law of Place.—A special contract, made in the state of Wisconsin, between a railroad company and a shipper, for transporting a car-load of live stock and emigrant movables from a point in that state to a point in this state, is to be interpreted according to the law of the former state. (*Page 495.*)

Same—Judicial Notice of Law of Foreign State.—In an action tried in this state, where the interpretation of such contract is involved, the courts of this state will not take judicial notice of the law of Wisconsin, but such law must be alleged and proven like any other fact in the case. (*Page 495.*)

Same—Presumption in Absence of Evidence as to Law of Foreign State.—In the absence of such proof, the law of that state will be presumed to be the same as the law of this state, and such contract will be interpreted in accordance with the law of this state. (*Page 496.*)

Validity of Contract Limiting Liability of Carrier.—By the law of this state, a common carrier of property or passengers may limit his liability by an express contract signed by the parties, except as to gross negligence, fraud, or wilful wrong of such carrier or its servants. (*Page 496.*)

Validity of Contract Exempting Company from Liability for Injury to Shipper Accompanying Live Stock.—A special contract for transporting a car-load of live stock and emigrant movables, made between a railroad company and a shipper, in which it is stipulated that the shipper shall be entitled to pass upon the same train to care for, feed, and water his stock, and load and unload the same, at his "own risk of personal injury, from whatever cause," is a valid contract, and exonerates the railroad company from all liability for any injury to the shipper while a passenger upon such train, not caused by the gross negligence, fraud, or wilful wrong of the company or its servants. (*Page 496 et seq.*)

Same—Liability of Company for Negligence Resulting in Injury to Shipper.—If, when acting under such contract, the shipper is injured while unloading his stock at the place of destination, by reason of the negligence of the railroad company or of its servants, not amounting to gross negligence, such railroad company is exonerated from liability for such injury. (*Page 501.*)

Same—Same—Injury after Arrival at Destination.—The shipper, while unloading his stock under such contract, is within the exemption clause of the contract, though the car has arrived at its destination, and the shipper has left the car for a short time, prior to the injury, and

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proceeded to an hotel, to get lanterns and assistants to aid him in unloading the car. (*Page 502.*)

APPEAL from Day county circuit court. *Reversed.*

John H. Perry and *Winsor & Kittredge* (*H. H. Field*, of counsel), for appellant.

Julian Bennett and *W. S. Glass*, for respondent.

CORSON, P.J.—In March, 1887, the plaintiff shipped from Avoca, Wis., a car-load of live stock and emigrant movables over defendant's road, consigned to himself at Bristol, D. T.

Facts. The car containing the freight arrived at Bristol, and the plaintiff, while removing the live stock from the car, was injured, to recover for which this action is brought. The live stock and movables were shipped under a special contract, by the terms of which the plaintiff was permitted to pass on the train to care for and look after his stock. The material parts of the contract, so far as they affect this case, are as follows:

“(Exhibit A.) Chicago, Milwaukee & St. Paul Railway, Live-stock Contract. * * * Persons in charge of live stock will be passed on the train with, and to care of it, as follows:

The contract. One man with two or three cars, two men with four to seven cars, three men with eight cars, which is the maximum number that will be passed for one owner. Passes will be furnished in manner provided on the back of this contract, to persons who, as above, may have been in charge of two or more cars of stock. No return passes given on west-bound shipments. No person will be passed with one car of live stock, except that one car of horses or mules or emigrant movables containing live stock will entitle the owner or man in charge to pass one way on the same train, to take care of it. * * * Such entry of persons in charge and certificate of billing agent to that effect will be the authority of conductors to pass them with the stock. All persons are thus passed only at their own risk of personal injury from whatever cause. A. C. Bird, Gen'l Freight Agent.”

“* * * Received of Anton Meuer, one car live stock and emg. mov. as per margin, to be delivered at Bristol, Dakota, station, at special rates, being \$45.00 per car; which stock is to be loaded and unloaded, watered and fed by said Anton

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Meuer, or his agents. * * * The Chicago, Milwaukee & St. Paul Railway Co., by D. Bohan, Agent. Anton Meuer, Shipper." Indorsement on back: "Parties actually in charge of and accompanying the within stock must write their own name in ink here. [Signed] Anton Meuer."

The contract was introduced in evidence by the plaintiff. At the close of the plaintiff's evidence, and again at the close of all the evidence in the case, the defendant moved the court to instruct the jury to return a verdict for the defendant on the ground that, by the terms of the contract, the plaintiff assumed all risk "of injury from whatever cause," and could not, therefore, recover in this action. These motions were denied and exceptions duly taken.

The learned counsel for the appellant contend that, under the terms of the contract signed by the plaintiff, he agreed to assume all the risk of personal injury from whatever cause; that such a contract was authorized by the laws of this state, and was a legal, valid, and binding contract, exonerating the defendant from all liability for personal injuries to the plaintiff, from whatever cause received. They further contend that the contract, though made in Wisconsin, would nevertheless be interpreted by the laws of this state, in the absence of evidence as to the laws of Wisconsin in relation to the contracts of common carriers, and that the law of Wisconsin will be presumed to be the same as the law of this state relating to such contracts. The contract in this case, having been made in Wisconsin, may be regarded as a contract of that state, and to be interpreted in accordance with the laws of that state. *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 37 Am. & Eng. R. Cas. 681; *Hazel v. Railroad Co.*, 82 Iowa 477.

Construction
of contract—
Law of place.

This court, however, will not take judicial notice of the laws of another state. Such laws must be alleged and proven on the trial, the same as any other facts in the case. No such evidence appears from the record in the case to have been given. In the absence of such evidence, this court will presume that the law of Wisconsin as to the right of a common carrier to limit the liability of himself or servants is the same as the law of this state upon that subject. *Sandmeyer v. Insurance Co.*, 2 S. Dak. 346.

Judicial notice
of law of for-
eign state.

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There is some conflict in the decisions of the different courts upon the question as to whether or not the court will presume that the law of another state is the same as the statute law of the state where the action is tried, but the weight of authority seems to support this view. In the case of *Palmer v. Railroad Co.*, decided by the supreme court of California in the present year, and reported in 101 Cal. 187, the court says: "The cause, so far as can be determined from the record, was tried upon the theory that the law of California is applicable. There is no suggestion that the law of Missouri, where the contract for transportation was made, was put in evidence. Under such circumstances, we are not at liberty to assume as a fact that the state of Missouri has a special statute on the subject, but must presume as a question of law that the law of that state is the same as our own. *Norris v. Harris*, 15 Cal. 226; *Hill v. Grigsby*, 32 Cal. 56; *Taylor v. Shew*, 39 Cal. 540; *Brown v. Gaslight Co.*, 58 Cal. 426; *Marsters v. Lash*, 61 Cal. 622; *Shumway v. Leakey*, 67 Cal. 458. Judged by our own statute, and by the lawful limitation which defendant might and did embrace in its bill of lading, it was bound to transport to Albuquerque, and deliver to the Atlantic & Pacific, connecting road, within a reasonable time, plaintiff's goods." See, also, 19 Am. & Eng. Enc. Law, 47; *Neese v. Insurance Co.*, 55 Iowa, 604; *Walsh v. Dart*, 12 Wis. 35; *Hadley v. Gregory*, 57 Iowa, 157.

The first question, then, to be determined is, what is the law of this state as to the right of a common carrier to limit his liability? for the contract in this case must be interpreted by our law upon this subject. There is a direct conflict in the decisions of the various courts upon the question of the right of common carriers to limit their common-law liability for the negligence of themselves and their servants by special contracts. In *Railroad Co. v. Lockwood*, 17 Wall. 357, the supreme court of the United States held that common carriers do not possess the power to limit their liability, even by express contract, for the negligence of themselves or their servants; and this view was affirmed in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 37 Am. & Eng. R. Cas. 681. On the other hand, the court of appeals of New York, in a number of cases, has held that common carriers possess such power.

Presumption
as to law of
foreign state.

Validity of
contract limit-
ing carrier's
liability.

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This doctrine is clearly laid down in *Bissell v. Railroad Co.*, 25 N. Y. 442, and affirmed by that court, after the decision in *Railroad Co. v. Lockwood*, *supra*, in *Maynard v. Railroad Co.*, 71 N. Y. 180.

This court, however, is not called upon to decide between these conflicting opinions, as the code of this state has settled the question within this jurisdiction. *Hartwell v. Express Co.*, 5 Dak. 463; *Hazel v. Railroad Co.*, 82 Iowa 477; *Kirby v. Telegraph Co.*, 4 S. Dak. 105. The sections of the code bearing upon this question constitute sections 3881-3888, Comp. Laws, and read as follows: "Every one who offers to the public to carry persons, property, or messages, is a common carrier of whatever he thus offers to carry." 3886: "The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract." 3887: "A common carrier cannot be exonerated by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or wilful wrong, of himself or his servants." 3888: "A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same."

By section 3886 it will be noticed that common carriers may, in this state, limit their liability by special contract; and by section 3887 an exception is made in cases of "gross negligence, fraud, or wilful wrong." It would seem, therefore, that, subject to the exceptions specified, a common carrier, by the laws of this state, may, by special contract, limit his common-law liability in all cases not included in the excepted cases.

This case seems to have been tried, and the jury instructed, upon the theory that the defendant, notwithstanding the stipulations in the contract, was liable for the ordinary negligence of itself and servants, and the question of gross negligence is eliminated from the case. The record discloses the fact that the defendant's counsel requested the court to instruct the jury that there was no evidence of gross negligence, and it was refused, the court stating "that he did not submit the question of gross negligence to the jury, but simply the ques-

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tion of ordinary negligence." We shall assume, therefore, for the purposes of this decision, that there was no evidence of gross negligence, fraud, or wilful wrong on the part of the defendant or its servants, and that the verdict of the jury was based entirely upon the theory that the injury to the plaintiff was caused by the ordinary negligence of the defendant or its servants. Taking this view of the case, was the defendant entitled to have his motion for an instruction to the jury to find for the defendant, granted at the close of the plaintiff's evidence?

As before stated, the special contract was introduced in evidence by the plaintiff, and was therefore a part of the plaintiff's case. It appears from this contract between the parties that defendant, in consideration of the plaintiff's stipulations to load and unload the cars, and feed and water the live stock on the trip, agreed to transport the car of stock and household movables at a reduced rate, and to pass the plaintiff on the same train, to care for and look after the live stock, but at plaintiff's own risk of personal injury, from whatever cause."

Assuming that plaintiff's injuries occurred while such passenger upon the train, and that they occurred from the ordinary negligence of the defendant or its servants, the limitation in the contract would seem to be such a one as is permitted

Validity of contract continued. by the statute, and would exonerate the defendant from liability for the injuries plaintiff sustained, the contract being a special contract, and signed

by the respective parties, as required by the statute. The terms of the contract are clearly stated. There is no ambiguity in its stipulations, and the intention of the parties is clearly ascertainable from the terms of the contract. The plaintiff was, by the terms of the contract, to be carried upon the same train with his live stock and movables, without extra charge, to care for and feed and water his stock; but at his own "risk of personal injury from whatever cause." This contract the law permitted the parties to make.

Section 3881 defines who are common carriers, and section 3886, in the same chapter, provides "that the obligations of a common carrier * * * may be limited by special contract." And section 3887 uses the same general term, "a common carrier," etc. Interpreting the contract by the law, it is difficult to perceive any valid reason for holding the defendant

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liable for plaintiff's injury. The contract, as we have seen, is one which the law permits the common carrier to make, and by its terms it clearly exonerates the defendant from liability for injuries caused by the ordinary negligence of the defendant or its servants. The motion, therefore, should have been granted.

The learned counsel for respondent contend that under the law of this state the contract is void. It is not claimed that the legislature of this state is not within the proper exercise of the legislative power, or is in violation of the organic act or the state constitution. But it is contended that under the common law a common carrier of passengers is required to exercise the utmost diligence and the highest degree of care and prudence in transferring passengers from one place to another by steam power, and that "there has never been any attempt to relax the rule requiring the utmost vigilance by the carriers of passengers in operating by this mode of conveyance." The requirement in this case being the most exact that the law imposes, no matter what the relation may be, any failure or omission of the person upon whom the duty rests is negligence, and this negligence is not subject to division into degrees; hence the courts hold that any negligence of a carrier of passengers is gross negligence.

The counsel, after further argument, concludes as follows: "We therefore conclude, in view of the law as established by the judgments of the courts placing upon the carriers of persons the responsibility of exercising the greatest degree of care and vigilance in the conveyance of human beings, that section 3887 of the Compiled Laws does not relieve from responsibility the carriers of persons in cases where negligence is shown, even though the carrier has a pretended release from liability in the form of a special contract. That, while the section apparently applies to common carriers in general, it must be limited in its operation to carriers other than those who engage in the transportation of persons. * * *"

While it is true that the utmost care is required on the part of the carrier of passengers, and that such carrier is ordinarily liable for negligence, whether gross, ordinary, or slight, still there may be in fact degrees of negligence in the management of its business by itself or its servants; and it is upon this theory that the legislature has deemed it proper to permit such carriers to limit its liability for ordinary or slight neg-

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ligence, when, under the law, it would ordinarily be held for injuries to persons caused thereby. The law-making power might properly permit special contracts exonerating such carriers from liability, when injury is caused to a person by ordinary or slight negligence, or even by gross negligence, if it deemed it proper. In New York, as we have seen, and other states, such contracts are permitted, and held valid, even without the aid of a statute. We are unable to discover any reason for holding that the law-making power may not make any provision governing the liability of common carriers, and authorizing them to limit their liability, as it may deem proper.

It is further contended that the contract in this case is invalid, under the provisions of section 3578, Comp. Laws, which reads as follows: "All contracts which have for their

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contract con-
tinued.**

object, directly or indirectly, to exempt any one from responsibility for his own fraud or wilful injury to the person or property of another, or violation of law, whether wilful or negligent, are against the policy of the law." But the contract in this case is not a contract to violate any express law. It cannot be said that a contract permitted and sanctioned by express law is a contract to violate the law. If we are correct, the sections of the statute relating to common carriers permit common carriers of passengers as well as common carriers of property to make the contract in question, subject, of course, to the exceptions contained in the law. The argument of counsel would have much more weight as applied to carriers of freight than as applied to the carriers of passengers, as carriers of freight at common law were absolute insurers of the safe delivery of the property intrusted to them, except where the loss occurred "by the act of God, or the public enemy, or by their own decay from inherent infirmity, or by the fault of the owner thereof." Further exceptions are made in the carrying of live stock, not material now to be stated. If, therefore, the contention of counsel is correct, the statute could have no effect, as there would be no class of carriers to which it would apply. We are of the opinion that the statute does apply to the carriers of passengers as well as to carriers of freight, and we cannot assent to the contention of counsel for respondent that the contract in this case is void.

The counsel further contend that, as the stipulation in the

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contract is general, and does not specifically limit the liability of the defendant to the negligence of itself or servants, such negligence is not included; in other words, the language of the stipulation, "risk of personal injury from any cause," does not include injury caused by the negligence of the defendant or its servants. There is force in this contention, and it has some support from the New York decisions. The doctrine is thus stated in *Maynard v. Railroad Co.*, 71 N. Y. 180: "When general words may operate without including the negligence of the carrier or its servants it will not be presumed that it was intended to include it." But this doctrine has generally been applied to contracts by carriers of freight. And even in this class of cases, when there is nothing in the contract upon which the general words can operate, unless the negligence of the defendant or his servants is included, such negligence is included in the general words "for whatever cause."

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company.

This doctrine is illustrated in *Cragin v. Railroad Co.*, 51 N. Y. 61, and *Holsapple v. Railroad Co.*, 86 N. Y. 275. In the former case the court says: "In this case the plaintiffs assumed and agreed to take the risk of injuries to the hogs in consequence of heat. Effect should be given to this stipulation. The parties must be held to have meant something by it. In consideration that the plaintiffs would assume and take certain risks, which would otherwise devolve upon the defendant, it agreed to carry at a reduced rate. If it be held that this stipulation simply exempts the defendant from liability for injuries to the hogs from heat without any fault on his part, then it gets nothing; for in such case, without the stipulation, it would not be responsible. Force and effect can be given to this stipulation only by holding that it was intended to exempt the defendant from negligence, in consequence of which the hogs died from heat. The judge at the trial, however, entirely ignored this special contract, and put the case to the jury upon the defendant's common-law responsibility, charging that it was liable if they found it guilty of negligence in the transportation of the hogs; and he refused to the defendant any benefit whatever from the special contract. In this I cannot doubt the learned judge erred."

In the latter case the court says: "The doctrine of *Mynard v. Railroad Co.*, 71 N. Y. 180, is decisive upon this question. It was there held that where general words limiting the

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liability of a carrier may operate without including his negligence or that of his servants, such negligence will not be within the exemption of the agreement. To this extent, at least, we all concur. However broad or general may be the language of the contract which does not specifically and in express terms release the carrier from the consequences of his own negligence, it will not effect such release if the general words may operate without including such negligence. That is the case here. The precise injury might have occurred which actually happened without fault or negligence on the part of the carrier. * * * It is in this respect that the present case differs from that of *Cragin v. Railroad Co.*, 51 N. Y. 61. In that case the injury resulted from the vitality of the animals, and their inherent nature and characteristics. For such injury the carrier was not liable at common law, and the general words of release and exemption could not operate at all, unless upon the negligence of the defendant. This case was decided upon that precise ground." In *Kenney v. Railroad Co.*, 125 N. Y. 422, 52 Am. & Eng. R. Cas. 235, the rule was extended to a contract for the carriage of passengers, but under special circumstances. It was held in that case that the general clause in question was capable of another construction, as applied to the facts in that case, and the same rule was applied as in the case of contracts for the carrying of freight. In this case there are no special circumstances taking the case out of the general rule that in the case of a passenger the only basis of a carrier's liability is negligence, and such a stipulation in the contract would be deprived of all operation unless it would cover negligence. A carrier of passengers is not an insurer of the safety of the passengers as is a carrier of goods, for the safe delivery of the goods. A carrier of passengers is only liable for negligence, and hence the stipulation in the contract has nothing to operate upon unless negligence is included.

In the discussion thus far we have assumed that the plaintiff was injured while a passenger upon defendant's road. It

**Liability of company—
Injury after arrival at destination.** is contended, however, by respondent, that he had ceased to be a passenger when the injury to him occurred, he having arrived at Bristol, the place of his destination, and left the car. It appears from the evidence that after the plaintiff's car was side-tracked at the station, the plaintiff went to an hotel in Bristol

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to get lanterns and assistance to aid him in unloading his car; that he was absent a short time,—how long does not appear, but evidently only for a short period,—when he returned and proceeded to unload his stock. While it may be true, as contended by respondent, that when an ordinary passenger arrives at his destination, and leaves the train and the depot, his relation to the carrier as passenger ceases, but, when one sustains to the carrier the relation sustained by the plaintiff in this case, we think a different rule applies. Being required by his contract to load and unload his stock, we are of the opinion that by the terms of the contract it must be held to extend to the final unloading of the stock. The stipulation is not limited, but provides that “all persons are thus passed only at their own risk of personal injury, from whatever cause.” This would seem to include loading and unloading as well as transportation in the train. The plaintiff was unloading the car under the terms of the contract, when the injury occurred. To hold that he was acting under the contract in loading the stock, but still absolved from the stipulations of the contract as to defendant’s liability for injuries to him, would be giving to the contract a construction not warranted by its terms. The plaintiff was permitted to go on the train with, and to take care of, his stock; and he was in and about the car for that purpose when injured.

In *Poucher v. Railroad Co.*, 49 N. Y. 263, the plaintiff was injured before the train started from the depot, by a stick of wood thrown from the tender, and the court held that defendant was exempt from liability under its contract. In that case the court said: “The injury complained of was sustained by plaintiff while he was on the defendant’s premises, moving about the train on which the animals were laden, for the purpose of taking care of them, and engaged in the performance of that duty. His only business there was to take charge of the stock in pursuance of the terms of the contract. The train was about starting, and he was to go in it according to the terms of the contract, being provided with a free pass for that purpose. The contract provided that he should go or send some person on the same train with the stock, to take charge of it, who should be carried free of charge; and that such person so riding free should take all the risk of personal injury from whatever cause, whether of negligence of the defendant or its agent or otherwise. We do not think it

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necessary, to bring the plaintiff within the operation of this stipulation, that he should have been actually riding at the time of his injury. The train had been formed, and was about to start. The plaintiff was there, under the contract, as a passenger, furnished with a pass entitling him to ride free, and coming from the performance of the duties contemplated by his contract."

We think that by a fair and reasonable construction of the contract the plaintiff, while unloading his stock, was within the terms of his contract, whether he was called a passenger or not. He was doing what the contract stipulated he should do,—unloading his stock under the contract; and defendant's exemption from liability continued so long as the plaintiff continued to act under the contract, or the contract was in force. It was evidently the intention of the parties in entering into the contract that the plaintiff was to assume all risk for personal injury from whatever cause, until the car was unloaded as provided in the contract.

There were a number of other questions discussed in the briefs of counsel and in the oral arguments, but, as these questions may not arise on another trial, we do not deem it necessary to discuss them. Our conclusion is that, under the contract construed by the law of this state and the record on this appeal, the motion of defendant that the court direct a verdict in its favor should have been granted.

The judgment of the court below is therefore reversed, and a new trial is ordered.

KELLAM, J.—I express no opinion upon the independent proposition that the statutes of a foreign state will be presumed to be the same as those of the forum. I concur, however, in the decision of the case. It is the duty of courts to sustain as valid and binding the deliberate agreement of parties until some reason is shown against it. Assuming that, in the absence of evidence, the courts of this state may not know what the statute law of Wisconsin is, or indulge any presumptions in regard to it, it still remains a fact that the laws of Wisconsin may be such as to allow or authorize a contract like this, and the court ought to treat the contract as valid, until it is affirmatively shown that the laws of that state do not allow it.

Concurring
opinion.

SAN ANTONIO & ARANSAS PASS R. CO.

v.

PRATT and YOUNG.

(Court of Civil Appeals of Texas, Nov. 6, 1895.)

Action for Breach of Contract to Transport Live Stock [(2) p. 542]—Injury by Delay—Instructions as to Damages.—In an action for the breach of a contract to furnish cars for the transportation of cattle, as a result of which the cattle sustained injury by reason of being placed overnight in a small pen in which were other cattle, instructions that if the company failed to provide suitable stock-pens and cattle-cars, and the cattle were then and there damaged, the shippers were entitled to such actual damages as they might be entitled to under the evidence, before touching on the condition of the cattle at the time they were loaded on the car, and that the true measure of damages was the difference between the market-price of such cattle as were shipped on the date at which it was agreed that they should be delivered at the market and the market-price of the same class of cattle in the same market on the date when the cattle should have been delivered there, do not constitute reversible error, when it is improbable that the jury understood the charge as authorizing a double recovery. (*Page 506.*)

APPEAL from Falls county district court. *Affirmed.*

Instructions referred to in opinion: "If you find that the defendant company failed and neglected to furnish and provide such stock-pens and cattle-cars as above stated, and you further find that such cattle were then and there damaged, then you will find for plaintiffs in such sum of actual damages as, in your judgment, they may be entitled to under the evidence before you touching the condition of the cattle at the time they were placed upon the car at that point."

"The true measure of damages is the difference between the market price of such cattle as were shipped on the date at which it was agreed that they should be delivered in Chicago and the market-price of the same class of cattle in the same market on the date said cattle should have been delivered in Chicago, leaving Lott, Texas, at 9 A.M., June 11, 1892."

Injury by Delay San Antonio & A. P. R. Co. v. Pratt

A. W. Houston and *Baker & Prendergast*, for appellant company.

KEY, J.—This suit is based upon an alleged breach of a verbal contract to furnish cars at a station on appellant's road, at a specified time, for the shipment of 290 head of cattle. It is not claimed that the verdict and judgment are not supported by the evidence; and therefore, as to the facts, we deem it sufficient to say that, notwithstanding the conflict in the testimony as to the existence of the alleged contract, the evidence offered by the plaintiffs proves the material averments in their petition, and supports the verdict and judgment.

The assignments of error presented in appellant's brief relate to the court's charge, and to the refusal to give a special charge asked by appellant. According to the plaintiffs' testimony, as a result of the defendant's failure to furnish the cars at the time agreed upon, they were compelled to hold their cattle overnight in a small pen, in which were other cattle, and by reason of that fact the plaintiffs' cattle were damaged. It was shown that if the cars had been furnished at the time specified in the agreement they might have reached Chicago, their destination, in time for sale on the 14th of the month; that the cars were not furnished and cattle shipped until the day following the agreed time; and that, considering the time the cars were furnished, they could not, with all proper dispatch, have reached Chicago before the 15th, and, in fact, they did not reach that point until the morning of the 16th. There was, however, a delay of five or six hours at Denison, after the cattle left appellant's road. It was also shown that on the 15th and 16th of the month such cattle had depreciated in value in the Chicago market, and were not worth as much per 100 pounds as on the 14th. The accounts of sales were in evidence, showing that the cattle were sold by the pound.

When considered in the light of the evidence, and in connection with the verdict, which is not charged to be excessive, we do not think the objections urged against the court's charge on the measure of damages afford ground for a reversal. It is not probable that the jury understood the charge as authorizing a double recovery. The written contract pleaded by appellant was shown by positive and uncontradicted evidence to have been executed without any considera-

tion, and for that reason, if for no other, the provision relied on by appellant was not binding on appellee.

No reversible error has been shown, and the judgment will be affirmed.

Affirmed.

GULF, COLORADO & SANTE FÉ R. CO.

v.

HUGHES & RATHMELL.

(*Court of Civil Appeals of Texas, May 22, 1895.*)

Action for Delay in Transportation of Live Stock [(2) p. 542]—Sufficiency of Complaint—Consideration of Contract of Shipment.—An averment in an answer to a complaint for damages caused by delay in a shipment of live stock, that in consideration of the mutual promises and agreements contained in the contract of shipment, the plaintiffs agreed, etc., sufficiently pleads the contract, since by Rev. Stat. Tex. art. 4488, every written contract made within the state imports a consideration, and by art. 1265, a plea impeaching the consideration of such an instrument, unless the want of consideration appear of record, is required to be under oath. (*Page 508.*)

Same—Effect of Pleading Want of Consideration in Reply—Burden of Proof.—A plea by plaintiff that the contract was without consideration did not shift the burden of proving a consideration to the defendant. (*Page 509.*)

Same—Admissibility in Evidence of Contract Containing Void Stipulations, where Consideration of Contract is in Issue.—The fact that plaintiffs filed a plea which put the consideration of the contract in issue, had no bearing on the sufficiency of the defendant's pleading, and hence that certain stipulations in the contract were not binding on plaintiff afforded no ground for rejecting the entire contract, but the contract should be admitted in evidence, and the jury instructed as to what portions thereof were binding on plaintiffs, and what not. (*Page 509.*)

Same—Competency of Evidence as to Damages Caused by Delay in Transportation.—In actions for damages sustained by delay in the transportation of live stock, witnesses who qualify, may state the market value of the cattle, and give their opinions as to the physical effect the delay would have on the animals, including an estimate of the decrease in weight per head, and all such other data as will enable the jury to reach a correct conclusion as to the loss sustained, but no witness should be allowed to omit all the data and state in money, the amount of damages or the decrease in value, which in his opinion the animals suffered. (*Page 509.*)

Same—Same—Responsiveness of Answer to Interrogatory.—To an interrogatory as to the hour and day when cattle arrived at their destination and their condition on arrival, an answer stating the hour and day, and that they were received "too late for sale on that day's market," as to

Injury by Delay

Gulf, C. & S. F. R. Co. v. Hughes

the latter portion thereof is objectionable because not responsive to the question. (*Page 510.*)

Same—Measure of Damages for Delay in Transportation of Live Stock [(3) p. 546].—In an action for damages for delay in the transportation of live stock, the measure of damage is the difference between the market value of the cattle at the time they reached their destination and the time they should have reached it had the company been without fault. (*Page 510.*)

Same—Right of Company to Offset Gain in Value of Part of Shipment.—In such an action, the fact that part of the shipment brought a larger price than it otherwise would had there been no delay in the transportation, will entitle the company to offset the gain against the loss on the other part because of the delay. (*Page 510.*)

Same—Statutory Prohibition of Taking Depositions in Jury Room.—The provision of the Revised Statutes (art. 1303), which prohibits juries to take depositions into the jury room, prohibits them as well from taking with them any portion of a deposition. (*Page 511.*)

APPEAL from Coleman county district court. *Reversed.*

J. W. Terry and *Chas. K. Lee*, for appellant company.

J. P. Ledbetter, for appellees.

KEY, J.—1. Appellant's brief contains 52 assignments of error, and it would protract this opinion beyond reasonable scope to discuss in detail all the questions presented. We therefore state that assignments presenting questions not hereinafter discussed have been duly considered, but are not regarded as well taken.

2. We think the court erred in sustaining appellee's special exception to the seventh subdivision of appellant's answer. The paragraph referred to averred that, in consideration of the mutual promises and agreements contained in the contracts of the shipments under which the cattle were shipped, the plaintiffs agreed, etc. By statute, every written contract made in this state imports a consideration (Rev. St., art. 4488), and a plea impeaching the consideration of such an instrument, unless the want of consideration appear of record, is required to be under oath. Rev. St., art. 1265. It follows, therefore, that the pleading in question was not defective on the subject of consideration.

It was held in *Railway Co. v. Wright*, 2 Tex. Civ. App. 463, by the court of civil appeals for the second district, that a shipper of live stock could, in the written contract for shipment, release the carrier for all claims for damages previously accrued; and this proposition does not seem to be disputed by appellees' counsel, but the contention is that the contract

Assignments
of error.

Sufficiency of
complaint—
Consideration
of contract.

Gulf, C. & S. F. R. Co. v. Hughes

Injury by Delay

pleaded, besides not showing a sufficient consideration, contains other stipulations that are unreasonable and void. The plaintiffs filed a plea under oath, alleging that the contract was without consideration; but, as the instrument imported a consideration, such plea did not shift the burden on appellant to prove a consideration. *Newton v. Newton*, 77 Tex. 511; *Railway Co. v. Wright*, *supra*.

Pleading want
of considera-
tion—Burden
of proof.

Besides the fact that the plaintiffs filed a plea putting in issue the consideration for the agreement can have no bearing on the sufficiency of the defendant's pleading. If it be true that other stipulations in the contract pleaded are not binding on the plaintiffs, that fact can afford no ground for rejecting the entire contract. In such case the court should admit the contract in evidence, and instruct the jury as to what portions thereof were binding on the plaintiffs and what portions were not. The contract may have been executed under such circumstances as to render it entirely void (*Railway Co. v. Carter*, [Tex. Civ. App.] 29 S. W. 565), but the pleading in question did not disclose such circumstances.

Admissibility
of contract in
evidence.

3. The court allowed the witness, Jake Rathmell, to testify as follows: "The usage of the cattle at Coleman before shipment affected their market value in Chicago, Ill., and decreased their market value at said place in the sum of \$4 per head for the steers, \$2 per head for the cows, and \$1 per head for the calves." Several other witnesses were allowed to give similar testimony, and the action of the court in overruling appellant's objections thereto is assigned as error. This evidence should have been excluded. In cases like this, witnesses who qualify themselves so to do should be allowed to state the market value, and give their opinions as to the physical effect that the injury complained of would have on the animals, even including the estimate of the decrease in weight per head, and all such other data as would enable the jury to reach a correct conclusion as to the loss sustained. But no witness should be allowed to omit all the data, and state in dollars and cents the amount of damage or decrease in value which, in his opinion, the animals have suffered. *Railway Co. v. Wright*, *supra*; *Kauffman v. Babcock*, 67 Tex. 241; *Railway v. Wesch*, 85 Tex. 593.

Competency of
evidence as to
damages.

Injury by Delay

Gulf, C. & S. F. R. Co. v. Hughes

4. The plaintiffs filed interrogatories to Frank O. Mills, and the thirty-second reads as follows: "State whether or not you received a shipment of cattle consigned to you by Hughes & Rathmell, at either or both Chicago and East St. Louis, on or about July 20 and 22, 1891. If yea, state the hour and day on which said cattle were delivered to you at each of said places, and state condition of cattle when delivered to you." To which the witness answered: "Yes, they were received at Union Stock Yards, Chicago, Ill., at 2.10 o'clock P.M. of July 23, 1891; too late for sale on that day's market." To so much of the witness' answer as stated that the cattle arrived too late for sale on that day's market appellant, in the form and manner required by statute, objected, because not responsive to the question; but the court overruled the objection, and allowed the testimony to go before the jury. The objection should have been sustained. There was nothing in the interrogatory that called for that statement, or apprised the defendant that such testimony was sought. It may be, in view of other uncontradicted testimony, that this error would not require a reversal.

5. As we understand the record, the court permitted the witnesses Frank O. Mills and Joseph Barry to testify concerning the market value of cattle at the points of destination at least one day earlier than the plaintiffs' cattle would have reached their destination had there been no delay on appellant's road. This was error. The difference between the market value of the cattle at the time they reached their destination and the time they should have reached it had appellant been without fault is the correct measure of damages.

6. The court refused to give the following special charge, requested by appellant: "Defendant requests the court to charge the jury that if you believe, from the evidence, that the calves brought more on the market at the time they were sold than they could have brought if they had gotten there at the time usual in the usual course of shipment, then you are instructed that such amount, if any, realized in excess of the market on the day they should have arrived, must be subtracted by you from whatever damage, if any, plaintiff has suffered on the other cattle." There was some testimony tending to show

Responsive-
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to interroga-
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Measure of
damages for
delay in trans-
portation.

Offset of gain
in value of
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that on July 23 calves were worth more on the East St. Louis market than they were on July 22, and we think the court erred in refusing to give the charge referred to. Suppose that while the delay complained of had caused some of the cattle to sell for less than they would otherwise, but had caused the remainder to sell for more than they would otherwise, and the amount of the loss on one portion and the gain on the other had been equal, then the plaintiffs would not have been damaged, and if the amount of the gain had been in excess of the loss the plaintiffs would in fact have been benefited. Unless the delay and injuries complained of caused the entire shipment to sell for less than it would otherwise have done, the plaintiffs are not injured.

7. After the jury had retired from the box, and were considering their verdict, the court, over the objections of the defendant, and at the request of the jury, detached the statements of account of sales testified to by Frank O. Mills and Joseph Barry, which were attached to their depositions, and sent same into the jury room. Appellant assigns this action as error, and, in view of the statute we think the assignment must be sustained. Article 1303 of the Revised Statutes in effect contains a prohibition against the jury's taking with them in their retirement the depositions of witnesses, and, of course, if they cannot take an entire deposition they cannot take part of one. The papers in question were part of the depositions of the witnesses, and, no matter how inconvenient it may have been for the jury to consider and properly decide the case without them, it was an infringement on the statute to allow them to go to the jury.

Statutory prohibition of taking depositions in jury room.

8. It would have been proper for the court to exclude the testimony offered by plaintiffs showing delay after the cattle left appellant's road; but in view of the charge limiting the plaintiff's recovery to delays and injuries occurring on appellant's road, we are not prepared to say that the admission of this testimony would be ground for reversal.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

Injury to Live Stock Houston & T. C. R. Co. v. Davis

HOUSTON & TEXAS CENTRAL R. CO.

v.

DAVIS (W. O.)

(*Supreme Court of Texas, November 7, 1895.*)

Action against Company for Injury to Live Stock—Duty of Company to Allege Facts to Show Reasonableness of Stipulation Requiring Notice of Injury.—Under a contract requiring a railroad company to transport live stock to the end of the line operated by it, there to be transferred to the line over which the stock is waybilled for further transportation by said company, it is the duty of the company itself to deliver the stock to the connecting line, and if it desires to avail itself of the defense that the shipper failed to give notice of damage to the shipment before delivery to the connecting line, it should allege such facts as would show that the shipper had the opportunity to give the notice required by the terms of the contract. (*Page 513.*)

APPLICATION by Houston & T. C. R. Co. for writ of error to court of civil appeals, Third supreme judicial district.

Frank Andrews, for applicant.

BROWN, J.—The defendant in error, W. O. Davis, sued the plaintiff in error for damages alleged to have been caused to some horses shipped from Marble Falls, over the road of the Houston & Texas Central Railway Company, to a point in the state of Georgia. There is no controversy that the damage, if any, was caused on the road of the plaintiff in error.

Case stated.

The railroad company set up in its answer, as a matter of defense, that a contract of shipment from Marble Falls to Georgia was entered into, in writing, between the parties, and that by the terms of the said contract the shipper agreed “that as a condition precedent to his right to recover in damages for any loss or injury to the said stock, he or his agent, the person in charge of the stock, shall give notice, in writing, of his claim therefor, and the full amount of the said loss or damage, to the station agent of the party of the first part at the station hereinbefore named, at the end of the line of the party of the first part, before said stock is removed from the

Houston & T. C. R. Co. v. Davis Injury to Live Stock

station, and before said stock is mingled with other stock, or delivered to any connecting line or railroad."

The answer alleged that the railroad company had an agent at Manor, giving his name, and also that it had an agent at Houston, also giving his name, and charging that plaintiff knew both of the agents at the places above named. The bill of lading did not specify the rate of freight to be charged, but it showed upon its face that it was a continuous shipment from Marble Falls to the state of Georgia.

Plaintiff excepted to this part of the answer of the defendant below—First, because the shipment was not an interstate shipment, and the limitation was void under the statutes of Texas; second, because it appeared that the limitation or requirement was unreasonable. The district court sustained the exception to the answer, which ruling was approved by the court of civil appeals.

Assuming this to be an interstate shipment, the question arises, was the answer sufficient in its allegations to show that the requirement by which the liability of the common carrier was limited was reasonable?

In the case of Railway Co. v. Harris, Judge Stayton, in delivering the opinion of the court, said: "If the contract were even valid, whether reasonable or not, the shipper would be bound by its terms; but, where its validity depends upon its being reasonable, the party who asserts its validity must allege the facts which make it so." 67 Tex. 172, 28 Am. & Eng.

Duty of company to allege facts showing reasonableness of stipulation.

R. Cas. 107. It will be observed that the requirement of the contract is that the shipper give notice to the agent at the terminus of the contracting railroad before delivery of the stock to the connecting line or railroad. The transportation of the stock was to be continuous from Marble Falls to Georgia, and by the terms of the contract itself, which is made a part of the defendant's answer, it is provided in substance, "that the H. & T. C. R. Co. was to transport the stock to Houston, Texas, the end of the line operated by it, there to be transferred to the railway over which said live stock was waybilled for further transportation by said railway company." It was therefore the duty of the railway company itself to deliver the stock to the connecting line, and, if it desired to avail itself of the defense that the shipper had failed to give notice of the damage before the delivery of the stock by it to

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Delivery

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the connecting line, it devolved upon it (the railroad company) to allege such facts as would show that the shipper had the opportunity to give such notice as was required by the terms of the contract.

The allegations of the answer do not show such a state of facts. It does not appear at what time the stock arrived in Houston—whether day or night; whether or not the agent to whom notice was to be given was convenient to the place of transfer; nor whether or not the stock was stopped over in Houston before transfer to the connecting line, for a sufficient length of time to enable the shipper to comply with the terms of his contract.

The answer having failed to allege the circumstances which would show this agreement to be reasonable, the exceptions were rightly sustained.

We do not feel prepared to approve the holding of the court of civil appeals to the effect that this was not an interstate shipment, and do not pass upon that question! In order that we may not be misunderstood upon this point, we have briefly given our reasons for refusing the application in this case.

The application for writ of error will be refused.

STONE (George W.)

v.

CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of South Dakota. November 9, 1895.*)

Unauthorized Delivery of Live Stock—Liability of Company.—T. shipped a car-load of cattle by defendant's road, and by the terms of the bill of lading executed by the defendant the cattle were consigned to T., care of P., order of S. & Co. The defendant delivered the cattle to P. without the order or consent of S. & Co., and without the bill of lading. *Held*, that defendant was liable to assignee of S. & Co. for the value of the cattle. (*Pages 515-518.*)

Same—Liability of Company on Draft against Consignee Discounted by Person whose Consent Was Necessary for Delivery.—T. at the time of shipping said cattle drew a draft against the same on P., in favor of S. & Co., which was attached to the bill of lading, and which was discounted by S. & Co. and the proceeds paid to T. This draft not being paid, T., after the delivery of the cattle, turned over to S. & Co. two

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car loads of sheep as security, but from which S. & Co., without any negligence or fraud on their part, failed to realize any proceeds. *Held*, that S. & Co., or their assignee, could recover of the defendant the amount of said draft, to the extent of the value of said cattle. (*Page* 515-518.)

Action to Recover for Conversion of Live Stock—Burden of Proof to Mitigate Damages.—In an action to recover the value of personal property converted, the burden is upon the defendant to establish facts in mitigation of the damages. (*Page* 517.)

APPEAL from Turner county circuit court. *Affirmed.*

Winsor & Kittredge, for appellant.

French & Orvis, for respondent.

CORSON, P. J.—This was an action to recover \$563, the value of one car-load of cattle alleged to have been converted by the defendant.

Judgment for plaintiff, and defendant appeals.

The facts as found by the court, briefly stated, are as follows: One D. A. Temple shipped by defendant's line, from Freeman, in this state, to the Minnesota Transfer, in Minnesota, one car-load of cattle, and received a bill of lading therefor. At the time of the shipment said Temple drew a draft in favor of Stone & Co. on Pierce Bros. for \$563. Stone & Co. discounted this draft, attached thereto the bill of lading duly indorsed, and forwarded the same for collection. Said car-load of cattle was delivered by the defendant to Pierce Bros. without the properly indorsed bill of lading, without the payment of the draft drawn against them, and without the consent of Stone & Co. At about the same time said Temple shipped two car-loads of sheep, received a bill of lading therefor and drew a draft in favor of Stone & Co. on Pierce Bros. for \$450. This draft was also discounted by Stone & Co., who, with bill of lading attached, forwarded it for collection. Temple went in charge of the cattle on the train.

Facts.

The disposition made of the cattle, sheep, and drafts is given in the language of the court in its tenth finding of fact: "Both of said shipments of freight having been delivered by defendant to Pierce Bros., they paid the draft of \$450 drawn against said sheep, but refused to pay the draft of \$563 drawn against the cattle. Said cattle were retained by Pierce Bros. and sold. The sheep were delivered by them to said D. A. Temple, who subsequently delivered them to his brother,

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J. P. Temple, at Morristown, Minnesota, with directions to keep them for George W. Stone & Co. They were so kept for some time. George W. Stone & Co. were informed of their whereabouts, and frequently communicated with said J. P. Temple in regard to the disposition of said sheep, claiming they should be treated as security for what was due from D. A. Temple. Neither George W. Stone & Co. nor the plaintiff notified the defendant that said sheep were held by J. P. Temple in the manner aforesaid, nor did either of them ever receive any of said sheep or any of the proceeds thereof. Said Pierce Bros. refused to retain the sheep, claiming they were scabby. D. A. Temple was not authorized by Stone & Co. or by the plaintiff to receive the sheep from Pierce Bros. He was not so authorized to deliver them to J. P. Temple, and in doing these acts he was not the agent of George W. Stone & Co. or of the plaintiff."

Counsel for appellant requested the court to make the following finding, which the court refused to make: "That George W. Stone & Co. afterwards ratified the taking of the sheep as their property by J. P. Temple, and have kept the same ever since." This refusal by the court is assigned as error. The court by this request was required to find a fact in regard to which there was conflicting evidence. The court, as will be noticed in its tenth finding, found that Stone & Co. held said sheep, after they had been delivered back to D. A. Temple, only as security. The finding requested was inconsistent with the finding so made by the court. After a careful examination of the evidence upon this point, we cannot say the court was justified in making the finding it did make, and in refusing to find as requested.

Counsel for appellant further insist that the court by its finding No 11, in which it finds that "no evidence was offered as to the value of the sheep," committed error, as they insist there was evidence of their value offered and received on the trial. And counsel call the attention of the court to a letter of Stone & Co. to J. P. Temple, in the record, in which they use the following language: "Should think they (the sheep) are worth at least \$3.50 per head there, but may be mistaken somewhat." In the same letter they say, "The sooner sold, the better, provided you can get not less than \$575 or \$580 net to us on the 200 head." And the counsel insist that this was an admission by Stone

**Facts contin-
ued.**

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& Co., to whose rights the plaintiff has succeeded, that the sheep were of the value of \$3.50 per head. We are inclined to the opinion that the counsel are right in their contention. *Blake v. Barrett*, 61 Iowa 79; *Cook v. Barr*, 44 N. Y. 156; *Winebrenner v. Collender Co.*, 82 Iowa 741; *Smith v. Schulenberg*, 34 Wis. 41.

In *Cook v. Barr*, *supra*, the court of appeals of New York says: "When a party to a civil action has made admissions of facts material to the issue in the action, it is always competent for the adverse party to give them in evidence; and it matters not whether the admissions were in writing or by parol, nor when nor to whom they were made. Admissions do not furnish conclusive evidence of the facts admitted, unless they were made under such circumstances as to constitute an estoppel, or were made in the pleadings in an action, when they are conclusive in that action. They may be contained in a letter addressed to the opposite party, or to a third person, and in either case are entitled to equal weight and credit. They are received in evidence because of the great probability that a party would not admit or state anything against himself or his own interest unless it were true."

But in the view we take of the effect of the other findings of the court this finding does not seem to us to be a material one, or one that could affect the decision of the court in this case. If Stone & Co., as found by the court, merely accepted the sheep as security, and did not realize anything from them, the fact that they were or were not of any particular value when so accepted as security, in the absence of evidence of negligence or fraud, would seem to be of no importance in the determination of this case. It therefore becomes unnecessary to decide the question presented at this time.

The first contention of counsel for appellant is that Stone & Co. having received the proceeds of the \$450 draft, and accepted the sheep for the \$563 draft, the claim of Stone & Co. was fully satisfied, and they therefore sustained no damage by reason of the conversion of the cattle. This contention is not tenable, for the reason that it assumes a fact not supported by the findings, namely, that Stone & Co. received the sheep as owners, and not as security. Had Stone & Co. taken the sheep in payment of the \$563 draft, there would be much force in their contention, but, as found by the court, Stone & Co.

Burden of
proof to miti-
gate damages.

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only received the sheep as security, and they realized nothing from them, and therefore the contention of counsel cannot be sustained. The fact that Stone & Co. accepted the sheep as security, and made an effort to collect the cattle draft out of the security, and failed, in no wise affects their right to recover, as against the defendant, for damages sustained by them in the conversion of the cattle.

The decision of this court in this case, (3 S. D. 330), was based upon the theory that the defendant had pleaded a good defense to the action, and, under the circumstances shown, was entitled to an opportunity to prove it. The burden of establishing facts tending to mitigate the damages was upon the defendant, and, failing to sustain such defense by the evidence and findings of the court, its defense became unavailable as against the plaintiff. What disposition was in fact made of the sheep is not disclosed by the record, but it seems to be assumed by counsel on both sides that they were disposed of prior to the commencement of this action for a sum only sufficient to pay the expense of their keeping. And this seems to be the effect of the findings of the court, as in the tenth finding he states that neither Stone & Co. nor the plaintiff received any of said sheep or any of the proceeds thereof. We shall therefore assume that such was the fact.

Counsel for appellant further contend that, if their first position is not sustained, the judgment in any event should be modified and reduced to \$113, the difference between the sheep draft, that was paid, and the cattle draft, that was not paid, for the reason that Pierce Bros. when they turned over the sheep to D. A. Temple had a right to and did apply the \$450 so paid on the sheep draft to the cattle draft. But the judgment, they contend, gives plaintiff in effect the receipts from the sale of the cattle, less \$113, and also the sheep as security for the \$450. The findings of the court are in effect opposed to appellant's theory, and their contention, in our opinion, cannot be sustained.

Our conclusions are that the legal effect of the various transactions, as found by the court, entitled the respondent to a judgment for the full amount of the cattle draft. It seems to be conceded that the delivery of the cattle without the payment of the draft against them, or the proper indorsement of the bill of lading, rendered the appellant legally liable for the amount

**Liability of
company.**

M. K. & T. R. Co. v. Woods

Stock-pens

of the draft to Stone & Co. When the sheep were delivered to Pierce Bros. and the draft drawn against them was paid, the sheep transaction, as between Stone & Co., Pierce Bros., and D. A. Temple, was closed, and the sheep were in law released from any claim by Stone & Co. Therefore, when Pierce Bros. delivered the sheep back to D. A. Temple he received them as owner, which, as the Stone & Co. draft was paid, he had the undoubted right to do. He then had the legal right to dispose of the sheep in any manner he deemed proper. In the exercise of that right he delivered the sheep to J. P. Temple, his brother, to be held by him as security, in legal effect, for the draft drawn against the cattle, upon which he (Temple) was still liable as drawer. Stone & Co. received them as such security, but, failing to realize anything from them, they still had the right to bring this action to enforce the defendant's liability.

As has been before stated, had the security been available, and had Stone & Co. received the amount due upon the draft, either from the proceeds of the sheep, or by payment by D. A. Temple, or any part of the amount, the defendant would have been entitled, as between it and Stone & Co. and this plaintiff, to the benefit of such payment, in mitigation of the damages in this action. But the defendant failing to show that Stone & Co. did in fact receive any amount, either from the proceeds of the sheep or by payment by D. A. Temple, the drawer of the draft, it failed in its defense, and there was nothing to go in mitigation of damages.

The judgment is therefore correct, and must be affirmed, and it is so ordered.

MISSOURI, KANSAS & TEXAS R. CO.

v.

WOODS (Lee).

(Court of Civil Appeals of Texas, Mar. 27, 1895.)

Action for Breach of Contract for Transportation of Live Stock—Instruction as to Duty of Company to Provide Stock-pens.—In an action against a railroad company to recover for the breach of a contract for the transportation of live stock an instruction to the effect that it was the duty of the company to provide all necessary stock-pens at the place of ship-

Stock-pens**M. K. & T. R. Co. v. Woods**

ment and to furnish the same to enable plaintiff to load his cattle within a reasonable time after they were at the place of shipment, is not objectionable because giving plaintiff a preference over other shippers in the use of the pens, where, when the stock was offered, there was sufficient pen space to enable plaintiff to load his cattle on that day, and it was not shown that any other shipper had any prior or better right than he. (Page 522.)

Same—Liability of Company for Failure to Furnish Stock-pens.—Where stock-pens are applied for and are not furnished according to a contract for the shipment of live stock, and it is not shown that any other shipper had the same right to the use of the pens as the applicant, the company is liable to the latter for loss occasioned by the failure to furnish the pens. (Page 523.)

Same—Competency of Witness to Prove Value of Live Stock.—A witness fully qualified to answer any question in regard to the condition of the market and the condition of particular cattle at the time of their sale may testify as to the difference in the value of the cattle in their condition at that time and their value had they been in good condition. (Page 524.)

APPEAL from Grayson county district court. *Affirmed.*

Foster & Wilkinson, for appellant.

Woods & Maxey and *W. W. Wilkins*, for appellee.

LIGHTFOOT, C.J.—This suit was brought by appellee for damages against appellant for \$1705.93, upon a contract for the shipment of 527 head of cattle from Doss, Tex., to Kansas City, Mo. The appellee bases his right of recovery upon the grounds: First, that the appellant's predecessor failed to comply with its contract to afford appellee the means of shipping his cattle from Doss, Tex., on September 19, 1891, which resulted in his cattle losing in weight and in condition for shipment and for the market; second, that his cattle were unreasonably delayed in reaching their destination and were negligently transported in such a manner that they were drawn, bruised, and crippled, so that their condition for market was unfavorably affected; third, that his cattle should have arrived at their destination and been put upon the market on September 20, 1891, but were negligently delayed in transit, so that they did not arrive in time to be put upon the market before the 22d of September, when the market had fallen. The defendant pleaded a general denial.

Plaintiff recovered a judgment for \$1000, from which this appeal was taken.

The facts proved and the verdict and judgment thereon justify the following conclusions: In September, 1891, appel-

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Stock-pens

lee, Lee Woods, entered into a contract with the Missouri, Kansas & Texas Railway Company for the shipment of 527 head of cattle in a train to themselves, from Doss, Tex., to Kansas City, Mo., and that the railway company would have the cars ready to receive his cattle at Doss on either the 17th or 19th of September. Facts.

On September 18th appellee drove his cattle from the pasture in the Indian Territory, and arrived at Doss, preparatory to shipment on the 19th, and so reported to the agent of the company upon his arrival; the cattle being held under herd a short distance from the station. Upon the same day (September 18th) one Suggs applied to the agent at Doss for transportation for a large number of cattle, and the company's agent arranged with appellee, and used the cars prepared for the shipment of his cattle, promising to have sufficient cars ready by the next day, 19th) to transport appellee's cattle, which was done. The stock pens were at once occupied by Suggs' cattle, and he began loading them, but did not finish until late in the evening of September 19th.

Appellee applied for the stock pens on September 19th to load his cattle; and although a sufficient number of the pens had been vacated by the Suggs cattle to allow room for appellee's cattle, and which he could have loaded on that day, yet the company's agent, in order to fill out another train-load with the Suggs cattle, allowed one Huggins to occupy the three vacant pens with a few head of cattle, to the exclusion of appellee's cattle, although there would have been ample room in one of the pens for Huggins' cattle, and the other two would have been plenty for appellee's cattle. By reason of the company's failure to furnish pens, appellee was not able to hold his cattle longer under herd without water. They became restless, stampeded, and ran off four miles to Red River for water, and appellee was not able to get them back until the 20th, when they were loaded on the cars and started on their journey.

Appellee's contract provided that he was to have a separate train, so that his cattle could be expeditiously transported and put into market without delay. At Denison other cars were taken in the train, and the cattle were delayed about 10 hours en route, and many of them were thereby greatly injured. Some of them were down in the cars, and were thereby scarred up and otherwise injured for sale, so that their value in the

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market was lessened. Upon their arrival at destination the market had gone down, and the cattle could not be sold for as much as they would have brought if they had arrived within a reasonable time after shipment. Appellee was damaged to the full extent of the verdict and judgment.

The other facts necessary to the determination of the case on this appeal we will notice under the different assignments of error, as we only deem it necessary to consider the questions raised by the assignments of error.

1. The first assignment of error is as follows: "The court erred in the third instruction given to the jury, in that, as applied to the evidence in this cause, it was thereby made the duty of defendant to provide all necessary stock pens at the place of shipment, and to furnish the same to enable plaintiff to load his cattle within a reasonable time after they were at the place of shipment, because thereby defendant was required to give plaintiff preference over any other shipper in the use of said pens for loading, although such other shippers might have equal or better rights than plaintiff to be first served." This assignment constitutes the first proposition as a ground for reversal.

Instruction as
to duty of com-
pany to provide
stock pens.

The third paragraph of the court's instruction as complained of is as follows: "If you believe from the evidence that the Missouri, Kansas & Texas Railway Company entered into a contract with the plaintiff to receive his cattle at the time and place charged, and to transport said cattle to Kansas City, then it devolved upon said railway company to provide all necessary stock pens at the place where the cattle were to be received, to enable plaintiff to load his cattle upon its cars; and if you believe from the evidence that said railway company failed to provide plaintiff with the stock pens necessary to enable him to load said cattle within a reasonable time after they were at the place of delivery, and if you believe that from such failure plaintiff's cattle suffered loss in weight, then said railway company would be liable to plaintiff for the damages so sustained by him; but if you believe from the evidence that the Missouri, Kansas & Texas Railway Company provided for the plaintiff the means of loading the cattle at the time and place named, and that plaintiff agreed that Suggs should load before him, and if you believe that plaintiff's delay was caused by this fact, or if you believe that some

other person, without the knowledge or consent of the agent of the Missouri, Kansas & Texas Railway Company, took possession of the stock pens, and for that reason the plaintiff could not ship his cattle at the proper time, the said railway company would not be liable for the damages occasioned thereby. In order for the plaintiff to recover for the alleged loss of weight in his cattle, the evidence must show that the loss in weight occurred by reason of the failure of said railway company to furnish the stock pens to load the cattle, and cannot include loss in weight from any other cause."

This charge is not open to the criticism in the assignment. Appellee based his right of recovery upon a contract for shipment, which was violated by the company. His cattle were offered for shipment on September 19th, as he had contracted. Suggs had vacated a sufficient number of stock pens for appellee to have loaded his cattle on that day, and it was not shown by appellant that any other shipper had a prior or better right to the pens. The charge was certainly as favorable to appellant as it had the right to expect. *Railway Co. v. McCorquodale*, 71 Tex. 46; *Railway Co. v. Nicholson*, 61 Tex. 491.

2. The second assignment of error is as follows: "The court erred in overruling defendant's motion for a new trial because the verdict of the jury was contrary to the law and the evidence, in this: That the evidence showed no default or wrong on the part of defendant, in regard to the furnishing of pens for the shipment of plaintiff's cattle, but showed that the delay in the shipment of plaintiff's cattle was caused by his own voluntary act in yielding to another shipper the right to first use the pens on the day on which he desired to ship his cattle, by which shipper the pens were occupied until sundown on that day, leaving no sufficient time on that day for the loading of plaintiff's cattle, and those of shippers having the same right to the use of the pens as plaintiff; and the evidence further showed that plaintiff's cattle were transported promptly and without delay, and the injuries to his cattle were chiefly or wholly caused by his own act in voluntarily surrendering his preference to ship to another shipper."

Liability of
company for
failure to fur-
nish stock
pens.

This assignment of error is not supported by the evidence. The company had charge and control of its own pens. Appellee agreed that the cars which had been prepared for him

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and ready on the 18th September might be used by Suggs under the agreement that other cars should be ready for him (appellee) to ship his cattle on the 19th. There was plenty of time for appellee's cattle to have been put in the pens on the 19th, after the Suggs cattle were taken out of them. He applied for the pens on the 19th, and they were not furnished according to his contract. It was not shown by the testimony that any other shipper had the same right to the use of the pens as appellee after the Suggs cattle were taken out of them. Appellee's cattle were not promptly transported according to contract.

3. The third assignment of error is that, "the court erred in admitting in evidence the answer of plaintiff's witness Geo. O. Keck to the sixth direct interrogatory, over the objections of defendant." This witness testified that he saw the cattle after they arrived at Kansas City, and described their condition, was familiar with the market there, and accustomed to handling cattle.

The interrogatory and answer were as follows: "Interrogatory 6. What effect, if any, did the condition you have described of said beef steers have upon their sale in the market, in reference to rendering them more salable or less salable, and in reference to making them more valuable or less valuable? And if you say that such condition rendered them less salable or less valuable, then state how much per head said cattle were diminished in value in the market on account of the condition they were in as you have described it,"—to which witness answered in his deposition as follows: "Answer to sixth interrogatory. The condition of the cattle rendered them less salable in the market, and their shrunk condition made them weigh less, and I would say that they were less valuable from a dollar and a half to two dollars from what they would have been in good condition."

It had been shown that appellee's cattle were in excellent condition when offered for shipment at Doss. This witness having fully qualified himself to answer any question in regard to the condition of the market and the condition of these particular cattle at the time they were sold, it was proper to show by him the difference in the value of the cattle in that condition and such value in good condition. He saw and knew the particular cattle, and their condition, and their value

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in the market. He was familiar with the market and knew what would be the value of the cattle in good condition. The testimony was admissible.

In the case of *Railway Co. v. Fagan*, 72 Tex. 130, the same question was raised, and the court said: "Appellant says that the court erred in permitting Fagan to give his opinion as to what the stock would have been worth at Memphis if they had not been injured in transportation. Knowledge of the market value of an article is hardly an opinion; it is a fact known from information. If a witness is not fully qualified to state the facts a cross-examination will show it. Such matters go to the weight of the evidence and the credibility of the witness, and not to the competency of his testimony."

4. The only remaining assignment of error presented by appellant is the fifth, which complains that the court erred in refusing to grant the motion for a new trial, because the verdict is excessive. We have carefully examined the evidence, and the verdict is not excessive.

The above are the only questions presented by appellant for our consideration; and, finding no error, the judgment is *affirmed*.

MISSOURI PACIFIC R. CO.

v.

HALL (J. O.).

(*U. S. Circuit Court of Appeals, Eighth Circuit, Feb. 23, 1895.*)

Action for Delay in Transporting Live Stock [(2) p. 543]—Admissibility of Evidence of Conversation between Shipper and Agent of Company after Contract of Carriage.—In an action for unreasonable delay in the transportation of live stock testimony as to a conversation between the shipper and the agent of the railroad company relative to the desire of the former to have his cattle delivered in time for a certain market is not inadmissible because tending to vary the terms of the shipping contract. (*Page 527.*)

Same—Competency of Opinion Evidence as to Shrinkage.—Witnesses engaged for some years in handling and shipping cattle are competent to express an opinion as to the extent that beef cattle will shrink in weight in a given time, under given circumstances. (*Page 527.*)

Same—Necessity of Specific Objection to Hypothetical Question.—An objection to an hypothetical question propounded to an expert, on the ground of "incompetency, irrelevancy, and immateriality," is too gen-

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eral to allow the objectant to urge in the appellate court that the question did not embrace a correct statement of the facts which the proof tended to establish. (*Page 528.*)

Same—Province of Jury as to Reasonableness of Delay.—The question of unreasonable delay in the transportation of live stock by a railway company, or whether such delay was attributable to a want of proper diligence on the part of the company's agents and employes, is fairly within the province of the jury on evidence that at the place where the cattle were to be delivered to a connecting line, through some misunderstanding they were reloaded in the same cars and that thereafter it was discovered that one of the cars of the train had a broken wheel, necessitating a further delay by reason of which the cattle were not received by the connecting company until some six or seven hours later than they should have been. (*Page 328.*)

Same—Right of Company to Instruction Excusing Delay Because of Compliance with Statute Requiring Stoppage for Food, Water, and Rest.—In an action to recover for damages sustained by unreasonable delay in delivering the cattle, the company was not entitled to an instruction that it was not liable for the delay if it was caused by compliance with the provisions of the revised statutes of the United States requiring shipments of cattle to be unloaded every 28 hours for feed, water, and rest for 5 hours, except when the cars in which they are transported are provided with all these facilities, when it appears that the delay was for 11 hours, after transportation of the stock for 14 hours in cars furnished with facilities for feeding and watering without unloading; that the stock was not delivered to the connecting carrier until 7 hours after it arrived at the connecting point, and that if it had been promptly forwarded it could have been delivered by the connecting carrier at its destination before the close of market hours, even though unloaded for rest by the latter for some hours. (*Page 530.*)

ERROR to the United States court in the Indian Territory.

George E. Dodge, B. S. Johnson, and J. E. Williams, for plaintiff in error.

William T. Hutchings, (*Stockton S. Fears* was with him on brief) for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge.—This was a suit by James O. Hall, the defendant in error, against the Missouri Pacific Railway Company, the plaintiff in error, to recover damages for an unreasonable delay in transporting 331 head of beef cattle from Nowata, in the Indian Territory, to the city of Chicago, Ill. The plaintiff recovered a judgment, and the defendant company has brought the case to this court, alleging several errors in the proceedings of the trial court. We will first notice certain errors that have been assigned relative to the admission of testimony.

Case stated.

It is urged, in the first instance, that the trial court erred in

permitting the plaintiff, James O. Hall, to testify to an interview that he had with the defendant's live-stock agent, Mr. Boline, on the day the cattle were shipped, because, as it is said, the testimony tended to vary the terms of the shipping contract, which was entered into, in writing, shortly after the alleged interview. An inspection of the record shows that the conversation in question occurred on the morning of Saturday, June 20, 1891, and that the trial court held that only so much of the conversation was relevant and admissible as tended to show that the defendant's agent was advised that the shipper desired to have his cattle delivered in Chicago in time for the market of Monday, June 22, 1891. No error was committed in admitting this testimony. It did not vary the terms of the written contract, and was not intended to have that effect. It was admitted, as the record discloses, solely for the purpose of showing that the carrier had notice of the shipper's intention to sell his cattle on a particular day. If the plaintiff gave the defendant company notice that he wished his cattle to arrive in time for the market of a particular day, he might reasonably expect that in view of such information the carrier would be more expeditious in executing the contract of affreightment. The knowledge that a party has, when he enters into an agreement, of the object which the opposite party hopes to accomplish, should be allowed to have some weight in determining whether the party thus informed discharged the obligation which he assumed, with reasonable diligence, and with a due regard for the accomplishment of the purpose which the other party had in view. *Blodgett v. Abbot*, 72 Wis. 516; *Railway Co. v. Gilbert*, 4 Tex. Civ. App. 366, and 23 S. W. 320; *McGraw v. Railway Co.*, 41 Am. Rep. 701.

Admissibility
of conversation
between ship-
per and agent.

It is claimed that the trial court further erred in allowing several witnesses, namely, Winfield Scott, W. C. Powell, and J. O. Hall, to testify as to the shrinkage in the weight of the cattle between June 22, 1891, and June 23, 1891, the day when the cattle were sold, the cattle having arrived on the 22d, but too late to be sold on that day. This objection is urged on the ground that no evidence was offered to show that these witnesses were experts, or that they had ever seen the plaintiff's cattle; also, on the ground that the questions which elicited the testimony were hypothetical and that they did not em-

Competency of
opinion evi-
dence as to
shrinkage.

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brace a correct statement of the facts which the proof tended to establish.

An inspection of the record clearly shows that two of these witnesses had been engaged for some years in handling and shipping cattle, and that they were doubtless competent to express an opinion as to the extent that beef cattle would shrink in weight in a given time, and under given circumstances. It is also fair to infer, we think, that the third witness followed the same calling, and was likewise competent to testify as an expert.

We are also of the opinion that the hypothetical questions propounded to these witnesses contained a fair statement of the facts which the evidence tended to establish, and that this ground of objection was not well taken.

There is a further reason, however, why the objection to the testimony in question ought not to prevail in this court. It was objected to solely on the ground that it was "incompetent, irrelevant, and immaterial." If the specific objection

Necessity of
specific objection.

to the testimony which counsel urge in this court had been urged in the trial court, it is obvious that the defendant would have had no cause to complain either of the form of the hypothetical question, or of the competency of the witnesses to testify as experts. The objection stated was therefore too general to be of any avail in an appellate court. We would not be understood as deciding that an objection on the ground of "incompetency, irrelevancy, and immateriality," is always too general, but we think that, when counsel intend to rely on the ground that a hypothetical question propounded to an expert witness is based upon an erroneous statement of the evidence, that fact, at least, should be called to the attention of the trial court. We refer to what was said on that subject by this court in *Insurance Co. v. Miller*, 8 C. C. A. 612, 614, 60 Fed. 254.

It is further contended—and this is, perhaps, the most important matter that we have to notice—that the defendant company did transport the cattle, and deliver them to the connecting carrier at Kansas City, without unnecessary delay, and that the court should have so charged the jury. The

Propriety of
instruction as
to unreasonable
delay.

evidence bearing on this issue tended to show that the cattle were received at Nowata by the defendant company about 1 P.M. on June 20, 1891; that they were loaded on cars with reasonable expedition; that the train left Nowata about 4 P.M. of the same day,

and arrived at Kansas City the following morning between 6 and 7 o'clock. It is not claimed that there was unnecessary delay on the part of the carrier prior to the arrival of the train at Kansas City. There was further evidence, however, which tended to show that the Wabash Railway Company, the connecting carrier over whose line the cattle train in question was to be hauled from Kansas City to Chicago, had received notice of the expected arrival of the train, and had detailed an engine and crew to haul the same through to Chicago, and that said engine and crew were ready to start from Kansas City between 8 and 9 o'clock A.M.; that, through some misunderstanding or oversight on the part of the defendant company's agents at Kansas City, the cattle were taken to the stockyards immediately on their arrival, where they were unloaded; that they were subsequently reloaded, in the same cars in which they had made the journey from Nowata when the mistake made in unloading them was discovered; that it was ascertained, after the cattle had been reloaded, that one of the cars in the cattle train had broken a wheel, which discovery necessitated some additional delay, so that the cattle were not in fact received by the Wabash Railway Company until about 1 o'clock P.M.,—some six or seven hours after they should have been delivered; and that they did not arrive in Chicago until about 7 P.M. the next day (Monday), which was four or five hours too late for that day's market.

We have given careful attention to all of the evidence bearing on this branch of the case, and have reached the conclusion that it was fairly within the province of the jury to decide whether there was an unreasonable delay at Kansas City, and whether such delay was attributable to a want of proper diligence on the part of the defendant company's agents and employes. Those questions, in our judgment, were properly submitted to the jury, and with the finding of the jury on that issue we cannot interfere.

It is finally insisted that the trial court erred in refusing the following instruction which was asked by the defendant company: "The court instructs the jury that, by the statutes of the United States (section 4386), railway companies and others transporting cattle are prohibited from keeping them on the cars, without feed, water, and rest, for a longer period than twenty-eight hours, and requires of all such companies or persons that cattle being so transported shall, at least at

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the end of twenty-eight hours, be unloaded, fed, and watered, and allowed at least five hours for rest, excepting only in cases where the cattle are transported in cars provided, not only with facilities for feeding and water, but also for room to rest. If, therefore, you find from the testimony in this case that plaintiff's cattle were shipped in cars not provided with all these facilities, or were so crowded as not to give opportunity for the cattle to lie down and rest, and that the time required in transportation from Nowata to Chicago would exceed twenty-eight hours, it then becomes imperative that these cattle should be unloaded at some point en route; and if you further find from the testimony that these cattle were not delayed longer in Kansas City than would have been necessary in such unloading, feeding, and resting, as above described, and they did not receive that treatment at any other point en route, in that event the court charges the jury that the delay at Kansas City was not a negligent one, and the defendant was not responsible for such delays, or any damage that may have resulted therefrom, and your verdict should be for the defendant."

Of its own motion, the trial court charged the jury, in substance, that the plaintiff could not recover if the jurors believed that the failure to reach Chicago in time for Monday's market was due to the fact that the cattle were unloaded by the Wabash Railway Company after they came into its custody, and were allowed to rest five hours, in order to comply with the provisions of section 4386 of the Revised Statutes of the United States. It will be observed that the defendant's instruction above quoted was framed upon the assumption that there was evidence from which the jurors might find that the cattle were not in fact delayed at Kansas City any longer than was necessary to comply with the federal statute, section 4386, *supra*.

In point of fact, the evidence showed conclusively that the cattle were detained in Kansas City from 7 A.M. until 6 P.M.,—about eleven hours,—while the statute only contemplated a detention of 5 hours. Besides the cattle had been en route only 14 hours when they reached Kansas City, and they were loaded in cars in which they could be fed and watered without unloading. Nevertheless, through the fault or mistake of some one, they were not delivered to the Wabash Railway

Company until about seven hours after they arrived at Kansas City.

It also appears that if they had been turned over to the Wabash Railway Company promptly on arrival, and had been immediately forwarded, they might have reached Chicago before the close of market hours on Monday, even if they had been unloaded for rest for some hours between Kansas City and Chicago. Under the circumstances, we think that the instruction above quoted was well calculated to mislead the jury, and that it was properly refused for that reason, if for no other.

The judgment of the lower court will be affirmed.

ST. LOUIS SOUTHWESTERN R. Co.

v.

SMITH (J. A.)

(Civil Court of Appeals of Texas, Nov. 20, 1895.)

Excessive Verdict—Necessity of Specific Objection by Motion for New Trial.—An objection to a verdict on the ground that it is excessive must be specifically called to the attention of the trial court by a motion for a new trial, otherwise it will be deemed waived. (*Page 532.*)

Same—Same—Sufficiency of Motion for New Trial.—A motion for a new trial on the ground that the verdict is not supported by or is contrary to the evidence, is not broad enough to cover an objection to the verdict on the ground that it is excessive. (*Page 532.*)

Injury to Live Stock by Negligent Transportation [(1) p. 541]—Measure of Damages [(3) p. 546].—The measure of damages to a shipment of cattle by reason of the rough and negligent manner in which they were handled while being transported, is the difference in their value at their destination in their condition when then delivered, and their value in the condition in which they should have been delivered. (*Page 532.*)

APPEAL from Coryell county district court. *Affirmed.*

McDowell, Miller & Hawkins, for appellant.

Clark & Bollinger, for appellee.

FISHER, C.J. — This action is one to recover damages arising out of injuries inflicted upon certain stock shipped by

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appellee over appellant's line of road. The only assignment of error questions the judgment of the court below for the reason that the evidence does not warrant the amount of damages found by the jury. The verdict and judgment below were for \$240 and interest on that sum from October 15, 1892, at the rate of 6 per cent per annum.

When the unsuccessful party in the trial court is dissatisfied with the verdict on the ground that it is contrary to the evidence, the objection should be specifically called to the atten-

Sufficiency of objection to verdict as excessive. tion of the trial court by motion for new trial; otherwise the objection will be held as waived. This rule also applies when the complaint is that the verdict is excessive. *Jacobs v. Hawkins*, 63 Tex. 4.

Simply stating that the verdict is not supported by the evidence, or is contrary to the evidence, is too general, and is not sufficient as a basis for an objection to the verdict on the ground that it is against the evidence. The motion for a new trial, so far as it objects to the verdict, is not broad enough to cover, and does not embrace, the objection to the verdict raised by the assignment of error.

But, independent of this, we think the evidence warrants the verdict and judgment of the trial court. There is evidence that shows that 19 head of oxen went into possession of appellant for shipment, and that they were then worth each from \$40 to

Measure of damages. \$50; and by reason of the rough and negligent manner in which they were handled when in the possession of appellant, 11 head of them, when they reached Texarkana, — their destination, —

were practically not salable in the market, and were then only worth from \$7 to \$10 each. Placing their value at \$40 each, the lowest amount testified by plaintiff they would be worth at Texarkana, if in good condition, and allowing \$10 each as the highest value he states they were worth in the condition in which they were delivered, would fix the amount of damages sustained by reason of injuries to the 11 head at \$330. The difference in value at the time they were delivered at Texarkana in their then condition and the condition in which they should have been delivered is the measure of damages. *Railway Co. v. Hume* (Tex. Civ. App.) 24 S. W. Rep. 915.

Judgment affirmed.

WILLIAMS (H. G.)

v.

HOUSTON & TEXAS CENTRAL R. CO. *et al.*

(*Court of Civil Appeals of Texas, May 30, 1895.*)

Action for Injury to Live Stock by Collision—Instruction as to Liability of Company not Engaged in Transporting Stock.—In an action against three railroad companies for injuries to a shipment of cattle it appeared that a portion of the injuries was occasioned by a collision between a train of one of the companies engaged in transporting the cattle, and the train of a company having no connection with the transportation. *Held*, that the latter company was entitled to an instruction that in considering its liability the jury should confine their inquiry to the extent of the damage done to the cattle in the wreck, although the court did charge the jury in general terms that they might find against such company or companies whose negligence was the proximate cause of the injury, and no further against either of said companies. (*Page 536.*)

Reasonableness of Stipulation as to Measure of Damages for Injury to Live Stock [(1) p. 541].—A stipulation in a bill of lading of an interstate shipment of live stock that in case of loss or injury affecting the shipment the damages should be measured by the market value of the cattle at the time and place of shipment is void as unreasonable. (*Page 536.*)

Measure of Damages for Injury to Shipment of Live Stock.—Where of a shipment of cattle some are killed and others injured while in course of transportation, the measure of damages for those killed is their market value at the place of destination, at the time and in the condition in which they should have arrived there less freight charges, if they had not been paid, and as to the cattle injured the measure of damages is the difference between their market value in the condition in which they were delivered and that in which they should have been delivered at their destination. (*Pages 537–538.*)

Action to Recover for Injuries to Live Stock—Proof of Market Value of Stock at Destination—Competency of Witness.—A witness having knowledge of the market quotations of live stock at the place of their destination is competent to prove their value at that place. (*Page 539.*)

Same—Same—Same.—A witness not properly qualified is incompetent to prove the market value of cattle at a certain place on a designated date. (*Page 539.*)

Injury to Shipment of Live Stock by Collision—Rights of Railroad Companies Inter Se.—Where injuries are sustained by live stock because of a collision between a train transporting them and the train of a company having no connection with the transportation, the company free from fault may recover from the company through whose negligence the injury was caused the amount of damages paid by it. (*Page 540.*)

Same—Same.—If, however, both companies are in fault there can be no recovery over. (*Page 540.*)

Injury in Transit**Williams v. Houston & T. C. R. Co.**

Same—Proof of Market Value of Stock.—If cattle injured in course of transportation have no market value at their place of destination proof may be given of their value in the nearest market. (*Page 540.*)

Same—Same—Province of Jury.—Where it appears that there is no market for injured cattle at their destination, the jury may take into consideration the fact that by reasonable care and attention at a reasonable expense on the part of the owner, the damages might have been mitigated and reduced from the estimate thereof by a recuperation of the cattle, and it is proper for the court to so instruct them. In such a case, however, the company should not be made to pay the entire expense of caring for the entire herd until the sale of all the cattle, but only the extra expense necessary to recuperate the cattle. (*Page 540.*)

Practice on Appeal—Statement of Facts.—Failure to comply with rules requiring presentation to the appellate court of a condensed statement of the facts proved will not furnish a reason for striking out a statement of facts consisting of the stenographer's notes of the testimony written out in detail in narrative form. (*Page 540.*)

Same—Same—Stipulations.—Where it has been agreed that bills of lading should not be copied into the statement of facts on appeal, but that reference should be made to them as attached to the pleadings, the omission to insert them at the end of the pleadings and inserting them at the end of the statement of facts is immaterial. (*Page 540.*)

APPEAL from Harris county district court. *Reversed.*

O. T. Holt and Baker, Botts, Baker & Lovett, for appellants.
Hutcheson, Campbell & Sears, for appellee.

GARRETT, C.J.—Appellee brought this action against the Texas & New Orleans Railway Company, the Houston & Texas Central Railroad Company, and the Missouri, Kansas & Texas Railway Company of Texas to recover damages for injuries to cattle shipped by him over the lines of the two first-named companies and other lines from Beaumont, Texas, to Pond Creek, Ind. T. After the cattle, in course of transportation, had been delivered to the Houston & Texas Central Railroad Company, and while that company was hauling them over its route to Ft. Worth, a train of 13 car-loads was run into at the crossing of the Central Company's railroad and that of the Missouri, Kansas & Texas Railway Company at Eureka, near Houston, by a train of the latter company, and four of the cars containing the cattle were badly wrecked, and a number of the cattle were killed and others were badly injured.

The Missouri, Kansas & Texas Railway Company of Texas was not a carrier of the cattle, and its railway was no part of the route of its shipment. Its liability was only for the cattle injured in the collision, if that was the result of negligence

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on its part, either wholly causing the same or contributing thereto. The shipment was of 53 car-loads, containing 1482 head, of cattle, and nearly all of the cars contained 28 head each. It was upon a through rate of \$65 a car, guaranteed by the Texas & New Orleans Railway Company, who received the cattle at Beaumont and commenced the carriage upon a bill of lading limiting the liability of the carrier to its line.

The trial below resulted in a verdict and judgment in favor of the Texas & New Orleans Railway Company and against the other two companies, both for the sum of \$6500.

It was conceded on the trial that the first 27 cars of the cattle went through practically without injury, and no complaint was made as to them. Of the remaining 26 cars, 13 were sent out from Houston over the line of the Central early in the morning of April 22, 1893, and were run into, as above stated, at the Missouri, Kansas & Texas Railway Company's crossing. Four cars were derailed and wrecked. The remaining 9 cars were put into a train with the other 13 cars, forming a train of 22 cars, which went forward, after a short delay, reaching Hearne, on the line of the Central, 121 miles distant, at 2.30 o'clock P.M., where they were unloaded, and fed and watered, after which they were re-loaded, and forwarded to Ft. Worth. When the train reached Hearne, 4 of the cattle were dead and 14 were found to be crippled. When these cars reached Ft. Worth, the end of the Central Company's line, two of the cattle were taken out and sold, and the balance were delivered to the Ft. Worth & Denver City Railway Company for further carriage. At Hearne the cattle in the 9 cars that were in the wreck were unloaded, and mixed with the cattle in the other 13 cars of the train, and all were reloaded into the 22 cars. The four cars that were wrecked contained 112 cattle. Some were killed outright, and others badly crippled, but 3 car-loads of these cattle, containing 66 head as delivered at Pond Creek, were collected and forwarded to their destination.

Appellee's foreman and another man in his employ, who were at Pond Creek, testified that these cattle in the 22 cars were all very badly damaged. One of them stated that they were damaged about one half. The Missouri, Kansas & Texas Company are liable, if at all, only for the damages caused by the collision. Some of the evidence tended to show greater damage than could have been inflicted by this defendant,

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because all of the cattle in the 9 cars that were in the wreck did not amount to one half of the 22 cars that were said to be damaged one half.

Under this state of the evidence, the Missouri, Kansas & Texas Company requested the court to give the following instruction: "If you believe from the evidence that the defendant, the Missouri, Kansas & Texas Railway Company of Texas, is liable to plaintiff in any amount; and if you further believe from the evidence that none of the plaintiff's cattle were routed or billed over the Missouri, Kansas & Texas Railway Company of Texas, and that none actually passed over its line; and if you further believe from the evidence that there were but thirteen cars of cattle in the train wrecked at Eureka, at the junction of the Houston & Texas Central Railroad Company and the Missouri, Kansas & Texas Railway Company of Texas, and that the injury and damage done at said wreck was the only injury for which the Missouri, Kansas & Texas Railway Company of Texas is in any way responsible,—then, in considering the liability, if any, of the Missouri, Kansas & Texas Railway Company of Texas, you will confine your inquiry to the extent of the damage done to plaintiff's cattle in said wreck."

The court charged the jury, in general terms, that if they found that by reason of the negligence of either of the defendant companies appellee's cattle were injured, to find against such defendant company or companies, whose negligence was the proximate cause of the injury, and no further against either of said companies; but, in view of the evidence, and owing to the fact that the liability of the Missouri, Kansas & Texas company is of a different nature from that of the other companies, the specific charge as requested should have been given.

The shipment was interstate. It was on a through rate from Beaumont, Tex., to Pond Creek, Ind. T., and the limitation on the liability of the several carriers to their own lines did not prevent it from being so. The lawful limitations contained in the bill of lading issued by the Texas & New Orleans Railway Company inured to the benefit of the connecting carriers; and, the shipment being interstate, our statute (Rev. St. art. 278), prohibiting common carriers from limiting their

Injury to live stock shipment by collision—Instruction as to liability of non-transporting company.

Validity of stipulation limiting liability of company.

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liability at common law does not apply. In the absence of a restraining statute, a common carrier may contract with the shipper for such limitations upon its liability as they may agree on, provided that they are reasonable and just, and not contrary to public policy. The law will not permit a common carrier to limit its liability for injuries resulting from its own negligence or that of its servants, as that would be an unreasonable limitation. The liability of the appellants in this case was made to depend upon their negligence, and it will not be necessary for us to pass upon the effect of the bill of lading any further than necessary to dispose of the question raised by the seventh assignment of error in the brief of the appellant Central Company, to the effect that a stipulation in the bill of lading that, in case of loss or injury affecting appellee's cattle, the damages should be measured by the market value of the cattle at the time and place of shipment. The court below was requested to so instruct the jury. In the absence of negligence, a more difficult question would be presented; but our supreme court has refused to follow *Hart v. Railway Co.*, 112 U. S. 331, and other cases in the same line, and has laid it down as the rule that, when a carrier receives freight, any contract which relieves from liability for its full value, if lost through the carrier's negligence, violates the wholesome rule so long and well established in other cases, in which the carrier attempts by contract to relieve itself from liability for the negligence of itself or employes. *Railway Co. v. Maddox*, 75 Tex. 300. See, also, *Railway Co. v. Edwards*, 78 Tex. 307; *Railway Co. v. Ball*, 80 Tex. 605; *Railway Co. v. Greathouse*, 82 Tex. 108; *Railway Co. v. Robbins*, 4 Willson, Civ. Cas. Ct. App. § 43.

This stipulation being held void as unreasonable, it is not necessary to pass upon the admissibility of the testimony of H. G. Williams, that there was no consideration for the contract shown by the bill of lading.

Upon the measure of damages the court instructed the jury that: "If you find for plaintiff, you may consider as the measure of damages the fair market value at Pond Creek, Indian Territory, at the time when same should have been delivered, of such cattle as were killed by such negligence; and if you find some of the cattle were injured by such negligence, and afterwards delivered to plaintiff at Pond Creek, and plaintiff cared

Measure of
damages.

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for and kept same until they were reasonably in condition to sell, and then sold same for the best price he could obtain therefor, and that such cattle at Pond Creek, when they should have arrived, and in the condition they should have arrived in but for such negligence, you will find further for plaintiff, for such amount as the evidence shows was the difference between their market value at Pond Creek, in such condition, and at such time as they should have arrived, and the price for which they were actually sold; and you may, in this connection, find for expenses, if any, reasonably and necessarily incurred in caring for such cattle after arrival at Pond Creek until they were sold."

Both of the appellants requested the following instruction: "If you believe from the evidence that the plaintiff's cattle, or any part of the same, were injured, while en route from Beaumont, Texas, to Pond Creek, Indian Territory, but were not killed, and if you further believe from the evidence that it was the purpose of the plaintiff at the time of making the shipment to pasture these cattle in the Indian Territory, until they were in condition to put on the market, then you will ascertain the actual damage which said injured cattle sustained; and in arriving at such actual damage, you will estimate from the evidence the market value of these cattle at the time and place they would have been on the market, had they been uninjured, and their market value at the time and place they were actually marketed, after having been injured, and the differences in these two prices, plus any extra expense that may have been incurred in caring for these injured animals, will be the measure of damages, so far as these injured cattle are concerned."

Error has been assigned upon the action of the court in giving the charge above set out and in refusing the requested instruction. We think after careful consideration, that the

Measure of damages continued. safest rule for the measure of damages that should apply in this case is the one commonly adopted, which is the market value of such of the cattle as were never delivered at the place of destination at the time and in the condition in which they should have arrived there, less freight charges, if they had not been paid; and, as to such of the cattle as were injured, the difference between their market value in the condition in which they were delivered and that in which they should have been de-

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livered at Pond Creek and at the time they arrived, less unpaid freight charges, if any. There was no delay in the delivery of the cattle to be accounted for in estimating the measure of damages. There was evidence that they were cattle, in good condition, had a market value at Pond Creek, and that they were damaged one half; and there was evidence, on the other hand, that they had no market value there. In the latter event, proof should be resorted to of their value in the nearest market. If there was no market for the injured cattle, as the evidence tended to show, and if, by reasonable care and attention at a reasonable expense on the part of the owner, and within a reasonable time, the damages could have been mitigated, and reduced from the estimate thereof, by a recuperation of the cattle, it seems to us that it would be proper for the jury to take such fact into consideration also; and it was, therefore, not improper for the court to so instruct them. But in such case the appellants should not be made to pay the entire expense of caring for the entire herd until all the cattle were sold, but only such extra expense as was necessary to recuperate the cattle. This expense, of course, should be added to the difference in the value of the cattle at Pond Creek in the condition in which they should have arrived and their value when recuperated. There is much less uncertainty in the rule we have stated than in the measure of damages proposed by the appellants.

The third and thirteenth assignments of error are upon the admissibility of the evidence received as to market value. Williams stated that the cattle had a market value at Pond Creek; that buyers from other places would go there; and that he knew the market value by quotations. All of his evidence taken together renders him competent to testify as to the market value of the cattle at Pond Creek. But Frost's testimony was clearly inadmissible. Without showing any knowledge of the matter he said: "I expect that 4-year old steers, on the 22d of April, last year, at Ponca or Pond Creek, would sell for \$25 per head. They cost something like \$15 here." Neither did Baker qualify himself to testify as what the average net loss on such shipments should be, even if such evidence was admissible. The bills of exceptions do not properly present the questions sought to be raised upon the admission of evidence as shown by the seventeenth, eighteenth, and twentieth

Competency of
witnesses to
prove market
value.

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assignment of error. It is not stated what the grounds were upon which the evidence was objected to.

We are of the opinion that if the collision occurred without negligence on the part of the employés of the Central Company contributing thereto, defendant would have a right to

Rights of com-panies inter se. recover over against the Missouri, Kansas & Texas Railway Company, if it was the result of negligence on the part of the employés of that company to the extent of the injury inflicted by the collision.

But, if the collision was the result of the negligence of the Central Company's employés, or of those of both companies, there can be no recovery over. The issue was made by the pleadings, and should have been submitted to the jury.

It is not thought necessary to pass on any of the other questions raised.

Appellee has filed a motion to strike out the statement of facts, because it was not made in accordance with the rules 72 to 78 of the supreme court for the district and county courts, (20 S. W. Rep. XVI) which require a condensed statement

Practice on appeal. of the facts proved. The statement of facts in the record appears to be the notes of the stenographer who took down the testimony of the wit-

nesses, written out in detail, though in narrative form, and is not made up at all in compliance with the rules. We know of no case, however, where the supreme court, or either of the courts of civil appeals, has struck out a statement of facts for a failure to comply with the rules; and, without attempting to lay down a rule as to what should be done when the rules have not been observed in making up statements of facts, we overrule the motion to strike out, but do so at the cost of the appellants, and will require them also to pay the cost of copying the statement of facts into the transcript.

It having been agreed that the bills of lading should not be copied into the statement of facts, but that reference should be made to them as attached to the pleadings, the omission to insert them at the end of the pleading and inserting them at the end of the statement of facts is immaterial.

For the errors indicated in the opinion, the judgment of the court below will be reversed, and the cause remanded.

Reversed and remanded.

ABSTRACTS OF RECENT DECISIONS

(1) **Carriers of Live Stock—Construction of Contracts of Carriage—Law of Place—Failure to Plead or Prove Foreign Law.**—A contract for the transportation of live stock is governed by the law of the state wherein it is entered into, but where in an action in another state for its breach the law of the foreign state is neither pleaded nor proven, the law of the former will apply. *Missouri, K. & T. R. Co. v. Cocreham*, (Tex.) 30 S. W. Rep. 1118.

Same—Same—Limitation of Liability—Interference with Interstate Commerce.—Section 196 of the Kentucky constitution, prohibiting common carriers from contracting for relief from their common-law liability, is not void because conflicting with the interstate commerce clause of the constitution of the United States. *Ohio & M. R. Co. v. Tabor*, (Ky.) 32 S. W. Rep. 168.

Same—Same—Same—Notice of Injury and Claim for Damages.—A stipulation in a contract for the transportation of cattle that written notice of injury to the cattle or claim for delivery shall be given to the company before the cattle are unloaded or mixed with other cattle, otherwise the shipper not to recover more than a fixed sum agreed on as the value of the cattle, is violative of Const. Ky. § 196, which provides that no common carrier shall be permitted to contract for relief from its common-law liability. *Ohio & M. R. Co. v. Tabor*, (Ky.) 32 S. W. Rep. 168.

Same—Same—Same.—A contract for the carriage of live stock which requires notice of claims for damages to be given before the stock is removed, as a condition precedent to the right to recover damages for loss or injury, is violative of the act of March 10, 1891. *Gulf C. & S. F. R. Co. v. Yates*, (Tex.) 32 S. W. Rep. 355.

Same—Same—Same—Validity of Stipulation Limiting Time for Bringing Suit.—A requirement in a contract for the shipment of live stock that suit be brought thereon within 40 days, is void because in conflict with the act of Mar. 4, 1891, which provides that it shall be unlawful for any person to limit by stipulation in a contract the time for the bringing of an action thereon to a shorter period than two years. *St. Louis S. W. R. Co. v. Williams*, (Tex.) 32 S. W. Rep. 225.

Same—Same—Same—Validity of Act Prohibiting Stipulations Limiting Time for Bringing Suit.—The Texas act of March 4, 1891, by which any person, firm, or corporation was forbidden to enter into a contract limiting the time in which to sue to a shorter period than two years, is binding as well in interstate as in domestic shipments, and is not an attempt to regulate interstate commerce. *Reeves v. Texas & P. R. Co.*, (Tex.) 32 S. W. Rep. 920.

Same—Liability of Company for Injury to Cattle by Overcrowding.—A railroad company is not liable for damages to cattle because of overloading the cars in which they are transported so as to unnecessarily crowd them, if while the cars are being loaded the ship-

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pers have knowledge that they are being overcrowded. *Ft. Worth & D. C. R. Co. v. Word*, (Tex.) 32 S. W. Rep. 14, *citing* *Railway Co. v. Daggett*, (Tex.) 28 S. W. Rep. 525 ; *Railway Co. v. Edwards*, 78 Tex. 308.

The majority of the court, per HEAD, J., stated on this branch of the case: "Had defendants in error [plaintiffs], relying upon statements of the agent of the railway company that the cars were 34 feet in length, placed therein the proper number for those of that size, without having it called to their attention that they were in fact being overloaded, the company would of course be liable for the damage thus caused; but even under such circumstances, as soon as the overcrowded condition of the cattle should be discovered it would be the owners' duty to adopt all reasonable means to make the damage as light as possible. *Railway Co. v. Daggett*, *supra*. It is true Word [one of the plaintiffs] testifies that he did ask the agent to unload the cattle and let him leave some of them, which he refused to do; and, had the jury under appropriate instructions so found, we are not prepared to hold that their verdict should be disturbed. *Railway Co. v. Kemp*, (Tex. Civ. App.) 30 S. W. 714. The evidence upon this issue was, however, sharply contradictory, and this conflict was not submitted to the jury. The jury was instructed "that if said cattle were loaded by plaintiffs, and were loaded too many in the cars, and plaintiffs knew that said cattle were being overloaded, or that the cars were not of sufficient capacity in size to carry said cattle safely and properly, or by the use of ordinary diligence could have ascertained the facts, then the plaintiffs would not be entitled to recover for damages on account of overloading said cattle." As we have seen, under the undisputed evidence the verdict should have been for the defendant upon this issue. If, under their own evidence, defendants in error have a case at all, it is because they were induced by the statements of the agent of the company, in connection with the contract they had with it, to load their cattle in the cars, believing them to be larger than they really were, and were refused permission to unload them after the danger was discovered. The fact that the contract called for cars 34 feet long would not authorize defendants in error to put in those actually furnished the usual number for cars of that size, after they discovered it could not properly be done. Under such circumstances, they should properly load the cars actually tendered, and hold the company for the damage caused by its breach of the contract to furnish larger ones."

Same—Liability of Company for Injury to Cattle Detained without Food because of Refusal to Pay Unlawful Freight Charge.—A shipper demanded cattle on their arrival at their destination, but the agent of the company exacted as a condition of delivery the payment of a greater freight charge than was due, and on the payment being refused the company retained the cattle until the next day without food. *Held*, that the shipper might recover for loss of weight caused by the act of the company. *St. Louis S. W. R. Co. v. Williams*, (Tex.) 32 S. W. Rep. 225.

(2) Actions for Breach of Contract for Transportation of Live Stock—Sufficiency of Complaint—Allegations of Damages.—In Missouri, *K. & T. R. Co. v. Cooreham*, (Tex.) 30 S. W. Rep. 1118, the allegations in the complaint as to damages were as follows: "Plaintiff says that

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if the said mules had been transported from said city of Clinton to said City of Hearne, via said city of Waco, over said lines of railroad, with diligence and reasonable dispatch, then he would have been able to sell them in the market at and in the vicinity of said city of Hearne, and to his pecuniary advantage at once upon their arrival there; but that, in consequence of the delay occasioned by the aforesaid negligent, oppressive, and tortious conduct of the defendant, he was not able to sell said mules when he reached said city of Hearne, but lost the opportunity to sell them on that account; that he was thereby put to great inconvenience, expense, and loss of time, and compelled to drive said mules from place to place seeking a market for them, and whereby they were much reduced in value. He was put to extra expenses in driving and feeding said mules from place to place to the amount of \$100, and he suffered loss of time of the value of \$100, and said mules were depreciated in value to the amount of \$300, all in consequence of the aforesaid wrongful acts of defendant, and to his actual damage in the sum of \$500," and it was held that the complaint was not demurrable because failing to sufficiently set out the items of damages.

Same—Reply as Admission of Defence in Answer.—In an action to recover for injuries to a shipment of live stock, the defendant company first denied generally and next set up a written contract containing a stipulation limiting its liability, and a further stipulation that it should not be held liable for loss or damage unless claim was made upon one of its agents within thirty days from the date of its contract, and also alleged that no written notice or claim had been made at any time. Plaintiff in reply pleaded that "the above conditions set out in said contract are void, are not in accord with the law of the state of Iowa; that they are opposed to public policy and are void." *Held* that there was no admission of the truth of the defences pleaded in the answer. *Nichols v. Chicago, G. W. R. Co.*, (Iowa) 62 N. W. Rep. 769.

Same—Competency of Witness to Prove Market Value of Stock.—A person who has sold stock at a certain time and place, and whose knowledge of the market values was gained by meeting parties who had sold a great deal of like stock, is competent to testify as to the market value of similar stock at the same place a few days prior to the sales by him. *Missouri, K. & T. R. Co. v. Cocreham*, (Tex.) 30 S. W. Rep. 1118.

Same—Evidence—Presumption Arising from Fact of Defect in Car.—Where the proof tends to show that cattle were injured by the breaking of the floor of the car in which they were being transported, and upon arrival of the car at its destination there was a large break in the car floor, it devolves upon the company to show that the breakage was not the cause of the injury complained of. *Ohio & M. R. Co. v. Tabor*, (Ky.) 32 S. W. Rep. 168.

The court said: "The proof conduces to show that the injury complained of was the result of the floor of the car breaking. Certain it is

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that when the car reached Cincinnati there was a large break in the floor of the car containing the cattle. Public policy, as well as the weight of authority, requires that the carriers, in such cases, must show that the injury was not caused by the breakage, else they will be liable for such injuries or damage as may accrue to the stock, when it appears that such breakage would reasonably cause the injuries or damage shown to have occurred."

Same — Same—Inference Arising from Fact of Injury.—In *Schaeffer v. Philadelphia & R. R. Co.*, 168 Pa. St. 209, which was an action to recover for injuries to a shipment of young mules and colts on the question as to the proof of the cause of the injury, the court said: "There was no evidence of an injurious accident to the train, nor was there any direct evidence of improper or negligent handling of the cars. Injury to the contents of a car may, however, furnish ground for an inference of want of ordinary care in transportation. *Express Co. v. Sands*, 55 Pa. St. 140; *Grogan v. Express Co.*, 114 Pa. St. 523; *Phoenix Pot Works v. Pittsburgh & L. E. R. Co.*, 139 Pa. St. 284; *Buck v. Railway Co.*, 150 Pa. St. 170; *Railroad Co. v. Eby*, 22 Wkly. Notes Cas. 92. There is no reason why this rule, with proper limitations, should not apply to animate objects. It, of course, would have no application in the case of injuries which are such as animals voluntarily inflict upon each other, or which cannot be accounted for, or which can be satisfactorily explained on any other ground than that of negligence in managing the train; nor in cases of death from natural causes, or causes entirely unknown, as in *Railroad Co. v. Raiordan*, 119 Pa. St. 577."

Same—Same—Same.—In an action for injuries to a live-stock shipment caused by the burning of the car in which the stock was being transported, plaintiff showed the burning and damages, and that the fire was not caused by the negligence of his employé in charge of the stock, and it was held that a *prima facie* case had been made against the railway company, and that the company having failed to rebut it, plaintiff was entitled to recover. *St. Louis & S. F. R. Co. v. Parmer*, (Tex.) 30 S. W. Rep. 1109, citing *Ryan v. Railway Co.*, 65 Tex. 13; *Railway Co. v. Scott*, 4 Tex. Civ. App. 76; *Railway Co. v. Swift*, 12 Wall. 262; *Missouri Pac. Ry. Co. v. China Manuf'g Co.*, 79 Tex. 26.

Same—Same—Burden of Proof as to Limitation of Common Law Liability.—In an action against a railroad company founded upon the common-law liability of a carrier of live stock, the burden of proof as to any limitation thereof rests with the defendant; and, unless it is admitted or clearly established by proof, the question is necessarily for the jury. *Schaeffer v. Philadelphia & R. R. Co.*, 168 Pa. St. 209.

Same—Same—Admissibility of Opinion Evidence.—In an action to recover for injuries to a shipment of young mules and colts from a point in Kentucky to a point in Pennsylvania testimony was presented to show that the animals were in good condition and unin-

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jured when they were received at Harrisburgh, in the latter state, that the injuries were of recent occurrence, and not such as the animals would have inflicted upon each other, except involuntarily if they were thrown down and trampled and jammed together by a collision or rough handling of the cars, and it was held that witnesses who had been for years engaged in shipping mules, who knew their habits and disposition, and the causes likely to lead to their injury while on board cars, and who saw the mules when they were unloaded, were properly allowed to express their opinions as to the cause of the injuries, leaving the value of their opinions for the jury to determine. *Schaeffer v. Philadelphia & R. R. Co.*, 168 Pa. St. 209.

Same—Same—Admissibility of Evidence of Arrival of one Shipment at Destination to Show Delay in Transportation of other Cattle Shipped at same Time.—In an action to recover for damages caused by delay in the transportation of cattle, it appeared that a portion of the cattle was shipped by the initial carrier as agreed, but that the other portion was sent to their destination over a different connecting line, thereby causing the delay complained of. *Held*, that evidence was properly admissible of the time of arrival of the cattle carried as agreed, for the purpose of showing delay in the transportation of the others. *Texas & P. R. Co. v. Boggs*, (Tex.) 30 S. W. Rep. 1089.

Same—Same—Admissibility of Evidence of Price Received for Shipment to Corroborate Evidence of Market Value.—Evidence of the price actually received for a shipment of live stock at its destination is admissible for the purpose of corroborating evidence of the market value of the stock at the same place. *Reeves v. Texas & P. R. Co.*, (Tex.) 32 S. W. Rep. 920.

Same—Same—Proof of Market Value of Stock—Admissibility of Proof of Condition and Weight at Time of Purchase.—As a circumstance tending to prove the value of cattle injured by the negligence of a railroad company, proof is admissible of their condition and weight at the time of their purchase. *St. Louis S. W. R. Co. v. Williams*, (Tex.) 32 S. W. Rep. 225.

Same—Province of Jury on Proof of Injury and Defective Condition of Car.—In *Chicago, St. P. M. & O. R. Co. v. Deaver*, (Neb.) 63 N. W. Rep. 790, it appeared that plaintiff on loading his cattle discovered that the cross-bar of one of the doors was cracked, and the iron fastenings at the bottom thereof were broken so that the door could not be securely closed, but would swing outward at the bottom, that the attention of the agent of the company was directed to the condition of the car, but that no effort was made to repair it; that on the arrival of the car at its destination it was discovered that one of the steers shipped therein had broken his leg, and on this evidence the question was submitted to the jury whether such injury was the natural and proximate result of the alleged negligence of the defendant, and it was held that as the cir-

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cumstances of the case, including the character of the injury and the condition of the door of the car, tended strongly to sustain the contention of the plaintiff, that the finding in his favor would not be disturbed on the ground that it was unsupported by the evidence.

Same—Same—Admissibility of Proof of Damages for Delay not Caused by Company.—In an action for damages alleged to have accrued to a shipment of cattle because of delay in selling them after they had reached their destination, it appeared that the cattle had been transported by the initial carrier to a certain point together with another lot of cattle under an agreement to transport both lots by a particular connecting line to their destination; that at the end of its line the initial carrier forwarded the lot of cattle in question as agreed, but the other lot was shipped by a different route and were accompanied by the owner thereof who had also purchased the first-mentioned lot en route. *Held*, that it was error to admit testimony as to damages to the cattle which had reached their destination on time by the route agreed because of the delay in selling them for the reason that their owner who had bought them en route had gone over another line and been delayed in reaching his destination. *Texas & P. R. Co. v. Boggs*, (Tex.) 30 S. W. Rep. 1089.

(3) *Same—Measure of Damages for Negligent Transportation—Market Value at Destination.*—Where it appears that the destination of stock for a certain place as the place of sale was within the contemplation of the parties at the time the contract was made, it is proper to consider the market value at that place in measuring the damages. *Reeves v. Texas & P. R. Co.*, (Tex.) 32 S. W. Rep. 920; *Railway Co. v. Eddins*, 7 Tex. Civ. App. 116.

HEUMPHREUS (Ella)

v.

FREMONT, ELKHORN & MISSOURI VALLEY R. CO.

(*Supreme Court of South Dakota*, Dec. 28, 1895.)

Carriage of Live Stock—Waiver of Stipulation Requiring Persons Accompanying Stock to Ride in Caboose.—In the absence of knowledge brought home to the defendant, or of anything tending to show that contracts under which certain witnesses had, in isolated cases, shipped live stock over portions of defendant's railway, provided that "it is agreed and understood that such owner and shipper shall feed, water, and take care of such stock at his own expense and risk," and "persons in charge of

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live stock, who are passed on trains with it, are so passed to take care of the stock, and must ride in the caboose attached to the train," the mere fact that they had ridden in the car with their stock is no evidence of a waiver of such stipulation, when freely entered into and acted upon by the shipper. (*Page 551.*)

Same—Same—Injury to Person Riding in Car with Stock in Violation of Contract of Carriage—Contributory Negligence.—Where in the absence of gross negligence on the part of the company, a shipper of immigrant movables, including a span of horses, rides in the car with his property, over the objection of the conductor in charge of the train, and in violation of a contract of shipment, in which he expressly agreed to ride in the caboose attached to the train, and by reason of such fact alone sustains a fatal injury, he is guilty of contributory negligence sufficient to defeat a recovery for such injury. (*Page 554.*)

CORSON, P.J., *dissenting.*

APPEAL from Pennington county circuit court. *Reversed.*

John B. Hawley and J. W. Fowler, for appellant.

Wood & Buell, (*Crawford & De Land*, of counsel) for respondent.

FULLER, J.—This was an action to recover damages for the loss of plaintiff's husband, who is alleged to have been killed by the negligence of defendant. Plaintiff had judgment in the court below, and the defendant appeals.

The shipping contract offered in evidence, and relied upon measurably by respondent, and wholly by appellant, was for the shipment of immigrant movables, including a span of horses, from Rushville, Neb., to Hot Springs, in this state, and contains the following provisions: "Persons in charge of live stock, who are passed on trains with it, are so passed to take care of the stock, and must ride in the caboose attached to the train. Persons in charge of live stock are prohibited from getting on or off the cars, or walking over them, while they are moving. * * * Persons who are thus passed are passed at their own risk of injury from any cause whatever." This contract was signed by Charles Heumphreus, as owner of the property, and by the agent of defendant at Rushville. Case stated.

The conductor in charge of the train at the time the cart containing the property of Charles Heumphreus was "picked up" at Rushville, after testifying that on leaving that station, and after he had called "All aboard!" Mr. Heumphreus asked him to wait until he could get into his car, continued

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as follows: "I told him to get into the caboose; that was the place for him to ride; that was a freight train.

Facts.

He got into the caboose. I did not see his contract at that time. I saw it after he got into the caboose and I commenced to take up tickets. He presented the contract as authority for him to travel on that train. I punched it with my punch, as it shows. I ran that train to Chadron, thirty-two miles from Rushville. I didn't come north of that. That was the end of my division. He didn't ride all the way in the caboose car with me. I didn't see him any more after we got to Hay Springs. I don't know where he went." At Chadron the crew was changed, and a train consisting of a caboose and 13 cars, including the one containing the property above mentioned, was "made up," and "pulled out" of that station on schedule time. Nothing appears to have been seen of Mr. Heumhreus from the time of his disappearance at Hay Springs until a derailment of a portion of the train, occasioned by the striking of a bull, took place, about midway between the stations of Smithwick and Buffalo Gap, when, by jumping from the car in which his property was placed, he sustained an injury which, upon the following day, resulted in death.

As disclosed by the evidence, the cause of and attending circumstances of the wreck were not of a character that would sustain an imputation of gross negligence upon the part of appellant's employes in charge of the train, and that question was not submitted to the jury. The engine and cars of which the train was composed were in good order, equipped with all proper appliances, operated by skilled and experienced railroad men, and the track, including rails and roadbed, was in good condition. Although twenty-five minutes appears to have been spent in running the train, upon a uniform down grade, $7\frac{1}{2}$ miles from the last station to the place where the accident occurred, there is a conflict in the evidence as to its rate of speed when a portion of the train was thrown from the track and Mr. Heumhreus jumped from his car. One of the plaintiff's witnesses testified that the rate was 25 or 30 miles per hour, and a large number of other witnesses testified, on the part of defendant, that they were running, at that time, from 18 to 20 miles per hour. The accident occurred upon a clear day, and at a point upon a public crossing which it is claimed might have, and perhaps, should have been observed

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by men in charge of the approaching engine, for a distance of nearly one half mile.

Respondent's evidence is to the effect that the animal struck was in the rear of about thirty head of cattle, all of which appeared to have passed over the track, and at the time were upon or in the immediate vicinity of the company's right of way, although appellant's engineer testified that he saw but two. While it appears that the engineer and trainmen put forth every possible effort to avoid the accident after the animal was discovered to be upon the track, counsel for respondent maintain that they were negligent in not observing earlier so large a number of cattle in dangerous proximity, and in time to stop the train and prevent the calamity which followed.

Facts continued.

Without discussion of appellant's evidence, or further pursuing the question as to the ordinary negligence of the company's employes, we will assume that the evidence in that regard, uninfluenced by other facts and circumstances, was sufficient to go to the jury, and direct our attention to what appear to be the controlling questions in the case.

With reference to the engine and train, the exact position of the car occupied by the husband of plaintiff does not clearly appear. The engine and the first and second cars attached thereto remained on the track, the next five, including the car of immigrant movables, were derailed, leaving the rear half of the train, including the caboose, upon the track. This caboose contained cushioned seats for 27 passengers, and there were, in all, but 5 occupants. It is safer, by far, to occupy a seat in the caboose at the rear of the train, than to ride in a freight car loaded with farm machinery, horses, household effects, provisions and poultry. The horses came out of the wreck unharmed, but their owner jumped from the car and was killed. Had he remained in the caboose, he would have sustained no injury.

Under the contract the company was liable to the extent of \$100 per head, in case of an accident resulting in death or injury to the horses; that is, the value thereof was in no case to be estimated at a greater amount. A witness who stated that he had never shipped horses in a car loaded with immigrant movables was allowed to testify, over appellant's objection, that four years prior to that time he shipped a stallion for a short distance upon appellant's line of railway, and rode

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in the car with the horse. He further testified that he did not know what kind of a contract he had with the company, and it does not appear that any one in its employ gave him permission to ride with the horse, or knew that he was doing

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tinued.

so. Seven years before the trial he entered into a contract at Chicago with the Chicago & Northwestern Railway Company for the shipment of horses in less than a car-load from that city to Rapid City, S. D., and rode in the car with the horses. With the foregoing experience and means of knowledge as a basis, he was allowed, over a valid objection, to state that it was, at the time to which he had referred, the custom of appellant to allow shippers of live stock in less than car-load lots to ride in the car with such animals, and that it was necessary for some one to do so, in order to help them up, and prevent injury, in case they were knocked down by the cars coming in contact with one another, or in starting or stopping the train.

Two or three other witnesses who had shipped live stock at different times over portions of appellant's line, in less than car-load lots, testified that it was customary and necessary for some one to ride in the car, to take care of the property, and that they had done so a portion of the time; but none of them stated that their contract required them to ride in the caboose, or that any employé of the company gave them such permission, or knew that they were thus riding in the car.

Obviously, a span of horses properly loaded would not ordinarily in starting or stopping be thrown on the floor of a car with such a degree of violence that they would be unable to arise without assistance, unless the operators of the train were guilty of actionable negligence, for which appellant would have been liable under its contract. The mere probability of such an occurrence suggests the danger attending a person who occupies a place in an ordinary freight car loaded with farm machinery, household furniture and horses.

By the law of the land, and the contract under which the property in question was shipped, Mr. Heumphreus was relieved from the necessity of endangering his life to prevent such injury to his horses as might be occasioned by the negligence of appellant's employés. Under that contract it was the duty of appellant to safely transport, in consideration of \$40, the car-load of personal property from Rushville to Hot Springs; and as consideration for his transportation the owner

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thereof agreed to ride in the caboose, the only place upon the train provided for passengers, and to take care of the horses. By riding in the caboose the owner had an ample opportunity to feed and water his horses, and to look after and take care of them at each station, while his car was standing upon the track. This was all the care that his contract contemplated, required, or permitted. Generally, where parties have deliberately entered into and acted upon a valid contract, the terms of which are expressed in ambiguous language, usage will not destroy its force and effect, by making a different contract, with reference to the subject-matter thereof. *Bank v. Ward*, 100 U. S. 206, 207; *Barnard v. Kellogg*, 10 Wall. 383; *Woodruff v. Bank*, 25 Wend. 673; *Coxe v. Heisley*, 19 Pa. St. 243.

It in no manner appears from the evidence offered to establish by usage a waiver of the provision assented to by the shipper in this instance, and by which he was bound to ride in the caboose attached to the train, that any of the shipments about which the witnesses testified were made under a contract containing any such provision. Neither was the evidence sufficient to establish the existence of a custom at the time when or place where the contract under consideration was made or was to be performed. It cannot be said, from the evidence, that Mr. Heumphreus or appellant ever knew that men had ridden upon that line of railway in freight cars with their live stock; and the very fact that he was called upon to promise, and did expressly agree, to ride in the caboose, would not only rebut any presumption that they had entered into a contract with reference to and in accordance with a usage of that character, but conclusively shows a determination upon the part of the company to prevent such an occurrence.

Waiver of stipulation in contract of carriage.

The word "usage" is defined by section 4753, Comp. Laws, as follows: "Usage is a reasonable and lawful public custom concerning transactions of the same nature as those which are to be affected thereby, existing at the place where the obligation is to be performed, and either known to the parties, or so well established, general, and uniform, that they must be presumed to have acted with reference thereto." If it were not a general, uniform, and public custom for men to ride on that road with their stock at that time, so well established that the parties "must be presumed to have acted with

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reference thereto," appellant would not be liable, upon the ground of usage, had the contract contained no provision that "persons in charge of live stock, who are passed on trains with it, are so passed to take care of the stock, and must ride in the caboose attached to the train." As the custom was not shown to be in existence, it could not have been known, and the parties could not have acted with reference to it. *Walls v. Bailey*, 49 N. Y. 464. Had all prior contracts expressly provided that shippers of live stock in less than car-load lots must ride in the freight car with their property, or, in the absence of a contract designating where such shippers should ride, had appellant admitted that a usage to that effect had existed and remained in full force upon its line from the time of the first shipment to the date of the contract before us, such usage or agreement would not prevent the parties from making a different arrangement, nor destroy the effect of a contract expressly providing that the shipper must ride in the caboose.

In the case of *Player v. Railway Co.*, 62 Iowa 723, it does not appear that the contract contained any provision that plaintiff should ride in the caboose, and the brakeman appears to have directed him to get onto the freight car, which was thrown from the track, and caused plaintiff to sustain the injury, to recover for which the suit was instituted. It was conceded that the negligence of defendant was sufficient to entitle plaintiff to recover, "if he was not guilty of contributory negligence in riding on the freight car, instead of the caboose," and the court said: "Where one having cattle on the train has time to get aboard the caboose, but fails to do so, and boards a freight car, and rides there, by reason of which fact he is injured, he is guilty of such contributory negligence as will defeat his recovery for such injury, notwithstanding the railway employes may have been negligent in not bringing the caboose within a reasonable distance of the depot."

In accordance with the express terms of his contract, and in obedience to the direction of the conductor in charge of the train when it left Rushville, and the only person by whom Mr. Heumphreus appears to have been seen before the accident, he took his seat and rode for a time in the caboose. Appellant had not waived the provision of his contract. Its conductor was fully authorized to direct him to ride in the

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caboose, and nothing whatever appears to have occurred which rendered it necessary for him to ride in the freight car. The fact that the owners of grading outfits, valuable stallions, or different animals, whose contracts might have been entirely different, found it necessary to ride in the car with their stock, in order to protect it from the negligent acts of the company's employes, has no tendency to prove that it was necessary for the shipper in this case to violate his contract, and to place his life in jeopardy, to prevent injury to ordinary horses, occasioned by such negligence, and for which the company was liable. Had there been no stipulation requiring the owner to ride in the caboose, or had a usage constituting a waiver of such provision been first established, and the character of the particular horses included in the shipment been shown to be such that they required constant attention, witnesses who had, under the same kind of contract, repeatedly shipped such horses, would, perhaps, under the Illinois case relied upon by respondent, be competent to testify as to the necessity of some one being in that particular car to protect the property.

In that case the party who sustains a personal injury was riding in a car with two valuable stallions that were being shipped to gether. By suddenly stopping the car thus occupied, the man was thrown down and injured. The contract of shipment prohibited him from riding in the car with the horses. Witnesses were permitted to testify at the trial that where two valuable stallions are shipped in a car together, under such a contract, it is not only necessary, but the constant practice of the company, to allow a man to ride in the car with them. The court said: "If it was absolutely necessary, in order to protect plaintiff's property, for plaintiff to ride in the car with the horses, and the company had waived the prohibitory clause in the contract of shipment, and consented that plaintiff ride in the same car with the horses, evidence tending to prove these facts was competent for the jury." *Railroad Co. v. Dickson*, 32 N. E. 380.

There being no evidence that appellant herein had waived the prohibitory clause in the contract before us, or consented that the deceased might ride in the car with his horses, and the reason and necessity therefor not being shown, the case above cited is of little assistance in determining the rights of the parties to this action. An emergency might arise, or

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special circumstances exist, by which a person who had been injured by riding in a freight car, with live stock, in violation of an agreement to care for the same and ride in the caboose, would be relieved from contributory negligence, but nothing to bring the case within such an exception to the general rule appears in the record before us. The conclusion to which we are brought renders unnecessary a consideration of appellant's contention that the rule laid down in the case of *Meuer v. Railway Co.*, (S. Dak.) 59 N. W. 945, should be applied to this case, although the same was tried in the court below upon a theory that suggests a waiver of the provision of the contract construed in that case; and, furthermore, it will not be essential to a determination of this appeal to consider assignments of error relating to the rulings of the court upon questions of evidence, and to its instructions to the jury. He could ride in the caboose and take care of his horses, but he could not ride in the caboose and at the same time ride in the freight car. The former is just what he undertook, by his contract, to do.

When respondent had rested, and again at the conclusion of all the evidence, appellant moved for the direction of a verdict against the plaintiff, and in favor of the defendant, for the reason, among others, that the undisputed evidence shows that the contract between the parties expressly provided that the deceased must ride in the caboose attached to the train, and that he was warned by the conductor against riding in the freight car, and directed to ride in the caboose, and the force and effect of such contract had not been destroyed or affected by the introduction of parol evidence.

We think this motion should have been sustained.

The judgment appealed from is reversed, and a new trial is ordered.

KELLAM, J.—I concur in the foregoing opinion. The carriage contract contained two provisions, which must be construed together, and so interpreted, if possible, as to make

Concurring
opinion.

both operative: "It is agreed and understood that such owner and shipper shall feed, water, and take care of such stock at his own expense and risk;" and "Persons in charge of live stock, who are passed on trains with it, are so passed to take care of the stock, and must ride in the caboose attached to the train." What we want to

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reach is the intention of the parties, for, in the construction of contracts, all rules are subservient to this end. Where did the parties to this agreement contemplate that Heumphreus should ride and spend his time in the transit,—in the box car, with his horses, or in the caboose or passenger car? I think the contract itself answers these questions, and directly disproves that the care of the stock contemplated was such as to require the shipper to remain with it. If such care was contemplated, it was utterly absurd to add, “and must ride in the caboose,” for both parties would know that he could not ride in the caboose, and at the same time, be with the horses in the box car.

Doubtless, the contract was in the form generally in use by that company, and was made for usual and ordinary conditions. There is nothing in this case suggesting that unusual conditions existed, either as to the character or disposition or value of the horses, or in any other respect that would make this case any other than the shipping of two ordinary horses with other property in a car by themselves.

The plaintiff recovered, not upon a showing that extraordinary conditions existed, presumably not within the contemplation of the parties, and so not necessarily covered by its terms, but upon evidence that in ordinary cases it is always necessary for the shipper to ride and remain with his stock in order to take proper care of it. This seems to be, in form, a general contract for the carrying of live stock.

Suppose this car had been filled with horses; could the plaintiff justify his riding and staying in the car with them, under the terms of the contract, by proving by witnesses that it was necessary so to do in order to take proper care of them? Such a holding would do an immediate wrong to the carrier, and an eventual greater wrong to shippers, for it would not only justify, but require, the carrier to greatly increase its charges, in order to get compensation, not only for carrying the stock, but for carrying the shipper in charge under an incomparably increased risk. I have no doubt what this contract meant. For carrying these horses the defendant company had undertaken and been paid for assuming a risk, as to them, limited to \$200. As to the shipper, its risk was unlimited. It had a right to, and ordinary prudence would dictate that it should, minimize the risk, as to him, by requiring him to ride in the place of greatest safety. I think that,

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when Heumphreus made this contract with the company, he agreed that in the absence of intervening causes, which would change ordinary conditions, he would ride, not in the car with his stock, but in the caboose, and that the general judgment of witnesses that it was necessary for shippers of stock to ride in the car with it was not competent to defeat or change the terms or effect of the agreement. It seems to me that a contrary ruling would necessitate the examination of a further question as to the effect of the concluding words of the stipulation. He was to "load, feed, water, and take care of such stock at his own expense and risk." If he was necessarily there taking care of the stock, was not he there at "his own risk," except as to risk from such negligence as the company could not contract against?

Upon the questions discussed I agree with Judge FULLER.

CORSON, P.J. (dissenting).—I am unable to concur in the views expressed in the majority opinion, and I shall attempt only a brief statement of my reasons for dissenting:

It may be conceded that if the deceased had been riding at the time of the accident in the caboose car, he would have escaped injury, as that car seems not to have been derailed or sustained any damage, and no passenger riding therein was injured. And it may also be conceded, as such seems to be the law, that when a person is injured while voluntarily, and without any necessity therefor, riding in a portion of the train where he has no right to ride, and in which place a person would be more likely to be injured from an accident to the train, and he is so injured by such accident, which injury would not have been sustained had he been in his proper place on the train, he cannot recover for such injury. *Railroad Co. v. Jones*, 95 U. S. 439; *Pennsylvania Co. v. Langdon*, 92 Pa. St. 21; *Lawson v. Railroad Co.*, 64 Wis. 447. In such case the passenger so riding without right or necessity on such a dangerous part of the train unnecessarily incurs the hazard, and therefore assumes the risk, and is deemed to be guilty of contributory negligence. The principal question, therefore, in this case, is, was the deceased unnecessarily, and without right, riding in the car with his stock at the time of the accident? If he was then the opinion of my associates is correct. If he was not, but was rightfully riding in that car, then, in my opinion,

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the case was properly submitted to the jury, and their verdict ought not to be disturbed. To determine this question, a careful examination of the contract under which he was riding is necessary.

This contract contains two important provisions. One reads as follows: "It is agreed and understood that such owner or shipper shall load, feed, water, and take care of such stock at his own expense and risk, and will assume all risk of injury or damage that the animals may do themselves or to each other, or which may arise from the delay of trains." The other reads as follows: "Persons in charge of live stock, who are passed on trains with it, are so passed to take care of the stock and must ride in the caboose attached to the train." It will be observed that by the first stipulation the deceased was required to "load, feed, water, and take care of such stock at his own expense and risk," and by the second to "ride on the caboose attached to the train."

One of the cardinal rules for the construction of contracts is that the whole of the contract must be taken together, so as to give effect to every part, if practicable. Section 3556, Comp. Laws. What is the meaning of the expression, "take care of such stock"? It cannot mean to "load, feed, and water" them, as those duties are specifically provided for, in express terms. Taking care of them, therefore, implies other duties to be performed pertaining to stock. Neither the court below nor this court can say judicially what that clause means, or what constitutes taking care of a partial car-load of stock, in addition to loading, feeding, and watering the same while in transit. Two sections of our code, it seems to me, prescribe the rule that is to be applied in such a case:

"Sec 3559. The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

"Sec. 3560. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

The manner in which the words we are considering are used renders them clearly technical, or as having a special meaning given to them by usage among shippers of such partial car-loads of stock. This provision of the contract, therefore,

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could only be understood or construed by the court by ascertaining, by means of evidence, what this expression is understood to mean by those familiar with the shipping of live stock in a less than car-load lots. This was the view evidently taken by the learned circuit court in admitting the evidence of witnesses as to the custom or usage of shippers of this class of stock in less than car-load lots, and the necessity for the shipper's riding in the car with his stock. Therefore, after the defendant had introduced the contract in evidence, and concluded its testimony, the plaintiff called witnesses to prove what was understood among shippers as constituting taking care of such stock while in transit.

As an illustration, Mr. Black, after testifying as to his knowledge of the business of shipping horses in less than car-load lots, was asked the question: "I will ask you if, in your judgment, it is necessary to ride with the stock, in order to take care of them, when they are thus shipped in less than car-load lots. A. Yes, sir, I think it was." He was then asked why it was necessary, and his answer was: "It is very necessary, if they get down, to help them up, in starting or stopping, or one car coming in contact with another car. I found it very necessary to help them up again, so no injury would result from their being thrown down." "Now, I will ask you if it is necessary, for one to take proper care of them, to ride with them, in so shipping in less than car-load lots. Yes, sir." Two or three other witnesses testified to substantially the same effect, and no attempt was made to contradict this evidence. There was also evidence tending to prove that it was a usage or custom, in shipping less than car-load lots, for the shipper to ride in the car with the stock.

Upon this evidence, can this court, or could the circuit court, say, as matter of law, that the deceased could not, under his contract, lawfully ride in the car with his stock, because, by the terms of his contract, he was required to ride in the caboose? I think the court would have no right to so decide. Upon this evidence as to what is required of a shipper who is bound to take care of his stock, the court should have, as it did, submitted the matter to the jury with the instruction that under the contract, if it was necessary to ride with his stock to take proper care of it, when it was so necessary he had the right to ride with his stock, and when not necessary he must ride in the caboose, and that it was for the jury

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to say whether or not the deceased was properly in the car with his stock when the accident occurred. This contract may reasonably be presumed to have been prepared by the defendant, and if there was any other meaning to be given to the term used in the contract, "taking care of such stock," than that given to it by the witnesses on the part of the plaintiff, it should have shown what was generally understood by the use of this term in such contracts.

It would seem, from an examination of the cases, that railroad companies have no uniform rule in drawing this class of contracts. In *Lawson v. Railroad Co.*, *supra*, the shipper was required to ride in the car with his stock. In *Railroad Co. v. Dickson*, 143 Ill. 368, the contract prohibited the shipper from riding in the same car with his stock, and required the shipper "to ride in the way car while the train was running between stops." And no provision such as we find in the contract before us was contained in that contract, so far as the statement of facts and the opinion discloses; yet in that case a shipper injured while in the car with his horses was permitted to recover on the ground that it was necessary to protect his property to be in the car. Certainly, if, under that contract, which absolutely prohibited the shipper from riding at any time with his stock, and requiring him to ride in the way car, "while the train was running between stops," and contained no clause requiring the shipper to take care of his stock, in terms, the shipper could recover, we fail to see why the plaintiff may not be allowed to recover in this case.

My conclusions are that the evidence of both use and custom among shippers of live stock in less than car-load lots, that the shipper usually rides with his stock, and the evidence that the necessity for stock shippers to so ride with their stock, to take proper care of it, was properly admitted and submitted to the jury, and that under his contract, as so understood, the deceased had the lawful right to ride with his stock, when necessary, and that whether or not he was properly there at the time of the accident was a question for the jury.

The jury, by their verdict, having in effect found that the deceased was properly in the car with his stock, the verdict should not be disturbed.

What Constitutes *Mo. Pac. Ry. Co. v. Wichita W. G. Co.*

MISSOURI PACIFIC RAILWAY CO.

v.

WICHITA WHOLESALE GROCERY CO.

(*Supreme Court of Kansas, July 6, 1895.*)

Carriers of Merchandise—What Constitutes—[(1) p. 565].—A railroad company taking loaded cars from its connection with another railroad and transferring them by means of a switch engine over a portion of its own track to a spur of its own, and receiving its compensation from the connecting road, acts as a common carrier, and is liable as such for the safety of the goods transported, no matter how short the distance from the place of receipt to that of delivery. (*Page 563.*)

Same—Extent of Liability.—The rule declared in the case of *Railroad Co. v. Maris*, 16 Kan. 333, that "the extraordinary liability of a railroad company as carrier of goods extends, not merely to the termination of the actual transit of the goods to the place of destination, but also until the consignee has a reasonable time thereafter to inspect the goods and remove them in the usual hours of business, and in the ordinary course of business," reaffirmed and held to apply to the facts in this case. (*Page 563.*)

Same—Relief from Liability as Common Carrier under Special Contract by Connecting Carrier—Pleading.—A railroad company which seeks to be relieved from liability as a common carrier by reason of a special contract made by a connecting carrier must plead such special contract, and cannot, under an answer denying generally the averments of the plaintiff's petition, which alleged liability as a common carrier, introduce evidence showing a special contract with the connecting carrier, especially where it maintains throughout the trial that it never assumed the relation of a carrier to the property for the loss of which the plaintiff seeks to recover. (*Page 565.*)

ERROR from Sedgwick county court of common pleas.
Affirmed.

On the 26th of September, 1889, the Wichita Wholesale Grocery Company commenced its action against the Missouri Pacific Railway Company, alleging, among other things, that on the 20th of April, 1889, the railway company was a common carrier, operating a railway in and through the city of Wichita, in this state; that it received on that date two car-loads of sugar, of the value of \$6252.50, from the St. Louis & San Francisco Railroad Company, in the city of Wichita, at the point of intersection of that railroad

Case stated.

Mo. Pac. Ry. Co. v. Wichita W. G. Co. What Constitutes

with the railway of the defendant, to be transported and delivered to the grocery company in Wichita, for a valuable consideration, paid by such company; that the railway company failed and neglected to transport and deliver the sugar to the grocery company as it undertook and agreed to do, and that thereby the grocery company lost the sugar, to its damage in the sum of \$6252.50, for which the grocery company demanded judgment. Trial had before the court with a jury April 28-30, 1890. The jury returned a verdict for the grocery company for \$6531.25, and also made special findings of fact.

The following, among other facts, were proved upon the trial: On or about the 26th of July, 1889, the two car-loads of sugar for which this action was brought were transported to the city of Wichita by the St. Louis & San Francisco Railroad Company. This sugar was consigned by the Louisiana Sugar Refining Company to the Wichita Wholesale Grocery Company, and was transported from New Orleans to Paris, Tex., over the Texas & Pacific Railroad, and from that point to Wichita over the Frisco Railroad. Under the contract for the shipment of this sugar, the two roads named were to transport it from New Orleans to Wichita, and deliver it to the Wichita Wholesale Grocery Company. The building occupied by the grocery company at Wichita fronted upon Water Street, and extended from Water street west to an alley. About two years prior to the loss of the sugar complained of, a spur track had been constructed by the Missouri Pacific Railway Company in the alley at the rear of the building occupied by the grocery company. This track connected with the switch of the railway company.

Facts.

Upon the spur track at the rear of the store all cars containing goods for the grocery company were placed, when delivered at the building or store of the company. At the intersection of the Sante Fé Railroad and the Missouri Pacific Railway at Wichita a Y had been constructed. The Frisco road at Wichita was connected with the Sante Fé road and had the use of the Y. The place of business of the grocery company was about a mile distant from the Frisco road, and it was the practice of that railroad company, when it brought goods to Wichita which it was to deliver to the grocery company at its building or store, to place the cars upon the Y in question, and then notify the agent of the Missouri Pacific Railway Company that the cars were on the Y to be placed

What Constitutes Mo. Pac. Ry. Co. v. Wichita W. G. Co.

on the spur track. The switch engine would then be sent to the Y, where it would get the cars, and place them upon the spur track at the rear of the building or store of the grocery company, the St. Louis & San Francisco Railroad paying the switching charges. The cars containing the sugar arrived at Wichita on Saturday afternoon, the 27th of July, 1889, over the Frisco Railroad. After the cars reached Wichita, the agent of the Frisco road notified the grocery company that the cars were there, and was instructed by that company to place them on the Y. The cars were placed upon the Y late Saturday night.

Facts continued. The Missouri Pacific Railway Company was notified that the cars were on the Y, and within the usual time sent its switch-engine to the Y and switched the cars upon the spur track at the rear of the building of the grocery company. This was on the afternoon of Sunday, the 28th of July. The cars were placed upon the spur track at exactly the same point they had always been placed under similar circumstances. The grocery company was in the habit of permitting the cars to stand on the spur track from one to three days before unloading. The Missouri Pacific Railway Company never unloaded the cars or broke the seals. Cars had been placed in the same manner on the same spur track on a previous Sunday, but it does not appear that the plaintiffs ever broke the seals, unloaded any freight, or exercised any actual control over such cars, except during business hours of business days. Some time on Monday morning of the 29th of July, the store building of the grocery company and the two car-loads of sugar were burned. It is not claimed that the Missouri Pacific Railway Company was in any manner responsible for this fire, or that it was in any manner negligent concerning the same. Subsequently judgment was rendered upon the verdict in favor of the grocery company and against the railway company for \$6531.25, with costs. The railway company excepted and brings the case here.

J. H. Richards and C. E. Benton, for plaintiff in error.

J. D. Houston and W. E. Stanley, for defendant in error.

ALLEN, J. (after stating the facts)—Three principal questions are presented by the record, which include all the various matters discussed in the briefs, and will be all it will be necessary for us to consider.

Mo. Pac. Ry. Co. v. Wichita W. G. Co. What Constitutes

1. Did the defendant company incur the liability of a common carrier under the facts of this case? The sugar was consigned by the Louisiana Sugar Refining Company, at New Orleans, to the plaintiff, at Wichita, and transported over the Texas & Pacific and St. Louis & San Francisco Railroads to Wichita. It was there placed on the Y, and switched by the Missouri Pacific road over its track to the spur track at the rear of plaintiff's warehouse. For these services the defendant was paid by the St. Louis & San Francisco Railway Company two dollars per car-load. All railway corporations are by statute made common carriers, and required to transport persons and property, as such, for all persons alike. Gen. St. 1889, par. 1212. The distance over which freight is hauled, whether in car-load lots or in less quantities, whether in its own cars or those belonging to connecting carriers, can make no difference with the capacity in which the company acts. A railroad transporting a passenger or a car-load of freight one mile, using a switch-engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train. The fact that compensation for this particular service was paid by the St. Louis & San Francisco Railway Company, while it might render that company also responsible, could not relieve the defendant company from its liability as a carrier. The defendant company was bound to receive and transport this merchandise as a common carrier, and there is nothing in the facts of the case showing that it did receive it in any other capacity.

What constitutes common carrier.

2. Did the defendant deliver the sugar to the plaintiff? It is earnestly insisted that when the railroad company placed the cars at the rear of the plaintiff's warehouse, at the exact place where the plaintiff was accustomed to receive and unload its freight, it had performed its whole duty, and that from the time it uncoupled its engine from the cars the property was in the possession of the plaintiff and at its risk. It is shown that the plaintiff was accustomed to break the seals of the cars so placed, and remove the freight without the presence of, or special permission from, any employé of the railway company. And it is claimed that under these circumstances the defendant had fully performed all the services it undertook to perform, and was discharged from all further liability. There are authorities

Delivery to consignee.

What Constitutes *Mo. Pac. Ry. Co. v. Wichita W. G. Co.*

which give some support to this contention. *Gregg v. Railroad Co.*, 147 Ill. 550, 61 Am. & Eng. R. Cas. 208; *Peoria & P. U. R. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 49 Am. & Eng. R. Cas. 81; *Independence Mills Co. v. Burlington, C. R. & N. R. Co.*, 72 Iowa 535.

We think, however, the facts of this case fail to show a delivery of the sugar to the plaintiff. It is true that the cars were placed in the proper position for unloading, and that the plaintiff was privileged to proceed to take out the sugar as soon as it pleased to do so. But the cars were so placed on Sunday. They were consumed by fire before business hours on Monday morning. The plaintiff was under no obligation to work on Sunday, nor was it bound to receive goods in the nighttime, especially as it is not shown that it was accustomed to do so. The property remained in the custody of the railroad company until the plaintiff could reasonably be required to receive it. In the case of *Railroad Co. v. Maris*, 16 Kan. 333, it was held that "the extraordinary liability of a railroad company, as a carrier of goods, extends not merely to the termination of the actual transit of the goods to the place of destination, but also until the consignee has a reasonable time thereafter to inspect the goods, and remove them in the usual hours of business, and in the ordinary course of business." In the opinion in that case the cases holding a different doctrine are referred to, but the court declined to follow them, deeming the better rule to be the one announced, and also that it was best supported by authority. We still adhere to the rule laid down by this court, and think it sustained by the best-considered recent cases. *Scheu v. Benedict*, 116 N. Y. 510; *Pindell v. Railway Co.*, 34 Mo. App. 675; *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727.

At the time the sugar was burned, it was in the cars in which it was placed by the consignor, on the track belonging to the defendant, where it was placed by its employés. The plaintiff had never in any manner taken actual charge of it, nor would it, in the usual course of business, open its warehouse, or be ready to receive it, until some hours after it was destroyed. It is not claimed that the defendant did actually deliver the sugar out of the cars to the plaintiff. It cannot make a constructive delivery, except at a time when the plaintiff might reasonably be required to receive it, and

Notes

What Constitutes

that could only be during business hours of a business day, where there was no custom or agreement to receive at any other time.

3. Original bills of lading issued by the Texas & Pacific Railway Company to the consignor, under which it is claimed that not only the receiving company, but all connecting carriers were exempted from liability for loss by fire, were offered in evidence by the defendant. The court excluded them. We think they were inadmissible under the pleadings in this case. The allegations of the petition were that the sugar was delivered to the defendant by the St. Louis & San Francisco Railway Company at the point of intersection of the railroads at Wichita, to be transported to the plaintiff at Wichita, and that the defendant failed to deliver. The answer consisted—First, of a general denial; and, second, of an allegation that the plaintiff's loss, if any, occurred by reason of its own negligence. The contract for shipment from New Orleans to Wichita was not mentioned in the pleadings, nor drawn in issue in the case. It was, therefore, irrelevant, and inadmissible.

Liability of
carrier—Bill
of lading as
evidence.

There is much comment by counsel on the instructions, but we think no other substantial question is presented in the case. Although there would seem to be a very great hardship in imposing on the defendant, which has received but \$4 for its services, a liability for a loss of \$6531.25, that liability arises from a rigid, but well-established, rule of the common law governing the transportation of property by common carriers, which we are not at liberty to abolish or modify.

The judgment is affirmed.

All the justices concurring.

NOTES

(1) p. 560]—**What Constitutes Common Carriers—General Obligation and Duty.**—A common carrier has been defined to be one who, as a regular business, undertakes for hire or reward, to transport the goods of such as choose to employ him, from place to place. *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 389.

To bring a person within the definition of a common carrier, it is essential that he be in a situation where he is obliged to serve all persons generally, on being tendered a suitable reward; and he must exercise the calling as a public employment. *Alexander v. Greene*, 3 Hill (N. Y.) 9.

Railroads as Carriers**Notes**

In order to charge a common carrier with responsibility as such, there must be a complete delivery to him of the property submitted for transportation. *Packard v. Getman*, 6 Cow. (N. Y.) 757.

And delivery must be to the proper person. *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388, *citing* *Wilson v. Spilsbury*, 3 Taunt. 144.

Same—Railroads as Common Carriers.—Railroads sustain a dual relation: (1) they are public highways open to all, and subject to the proper regulations of the corporations owning them, as to their uses; (2) they are common carriers subject to the law in that capacity also. *Railroad Commissioners v. Portland & Ohio Central R. Co.*, 63 Me. 269; *New England Ex. Co. v. Maine Central R. Co.*, 57 Me. 194; *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287; *Cincinnati & S. G. A. S. R. Co. v. Cumminsville*, 14 Ohio St. 523.

Railroads are common carriers, and bound to carry, when called upon for that purpose, and can charge for their services only a reasonable compensation. *Winona & St. Peter R. Co. v. Blake*, 94 U. S. 180.

Railroad companies as common carriers are amenable to the liabilities imposed by the law applicable to common carriers. *Southwestern Railroad Co. v. Webb*, 48 Ala. 585, *citing* *Selma & M. R. Co. v. Butts*, 43 Ala. 385; *Jeremy*, Law of Carriers, 4, chap. 1; *Redfield on Carriers*, p. 27, chap. 3, § 37.

The supreme court of Massachusetts, in *Thomas v. Boston & P. R. Corp.*, 51 Mass. 472, in establishing the liability of railroads as common carriers, says: "The introduction of railroads into the state has been followed by their construction over the great lines of travel of passengers and transportation of merchandise; and the proprietors of these novel and important modes of travel and transportation, which have received so much public favor, have become the carriers of great amounts of merchandise. They advertise for freight; they make known the terms of carriage; they provide suitable vehicles and select convenient places for receiving and delivering goods; and, as a legal consequence of such acts, they have become common carriers of merchandise, and are subject to the provisions of the common law which are applicable to carriers."

A railroad company which is engaged in the business of transporting live stock over its road, and which is accustomed to furnish suitable cars therefor upon reasonable notice, whenever it is within its power to do so, and which holds itself out to the public generally as such carrier for hire, upon such terms and conditions as it prescribed in its bills of lading, makes such railroad company a common carrier of live stock with such restrictions and limitations of its common-law duties and liabilities as arise from the instincts, habits, propensities, wants, necessities, vices, or ailments of such animals under the contract of carriage. *Ayres v. Chicago & N. W. R. Co.*, 71 Wis. 372, 35 Am. & Eng. R. Cas. 679; *citing* *Richardson v. Chicago & N. W. R. Co.*, 61 Wis. 601, 18 Am. & Eng. R. Cas. 530; *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727; *Moulton v. St. Paul, M. & M. R. Co.*, 31 Minn. 85, 12 Am. & Eng. R. Cas. 13;

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Railroads as Carriers

Evans v. Fitchburg R. Co., 111 Mass. 142; *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247; *Rixford v. Smith*, 52 N. H. 355; *Clark v. Rochester & S. R. Co.*, 14 N. Y. 570; *South & N. A. Railroad Co. v. Henlein*, 52 Ala. 606; *Baker v. Louisville & N. R. Co.*, 10 Lea (Tenn.) 304, 16 Am. & Eng. R. Cas. 149; *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 342, 30 Am. & Eng. R. Cas. 17; 3 Am. & Eng. Ency. Law, pp. 1 to 10, and cases there cited. See also, *Johnson v. Midland Railroad Co.*, 4 Exch. 372.

At common law a railroad company, as a common carrier, is bound to carry for all, and for a reasonable remuneration, but he is not under obligations to treat all customers equally. *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623; *Peeke v. North Staffordshire R. Co.*, 10 H. L. Cas. 511; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Fitchburg R. Co. v. Gage*, 12 Gray (Mass.) 393; *Great Western R. Co. v. Sutton*, 4 Eng. & Ir. App. 237; *Houston & T. C. R. Co. v. Rust*, 58 Tex. 98, 9 Am. & Eng. R. Cas. 123; *Baxendale v. Eastern Counties R. Co.*, 4 C. B. N. S. 63.

While at common law the rule seems to be, not that carriers shall transport for all parties at the same rate of compensation, otherwise their contracts are illegal and void, but that they shall transport at reasonable rates to all, it should not be forgotten that quite generally this rule has been changed by statute in the various states, and is particularly controlled by federal law, in this country, at present under the provisions of the interstate commerce act.

It is the duty of railroad companies, as common carriers, to give all shippers reasonable, fixed, equal, and impartial rates without discrimination. *Shipper v. Pennsylvania R. Co.*, 47 Pa. St. 340; *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 409; *Sanford v. R. Co.*, 24 Pa. St. 380; *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33; *Cumberland Valley R. Co.*, 62 Pa. St. 230; *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309, 6 Am. & Eng. R. Cas. 594.

The American decisions are quite numerous which relate to the duty laid by the common law upon common carriers to treat customers without discrimination. *Sanford v. R. Co.*, 24 Pa. St. 378; *Audenried v. Philadelphia & Reading R. Co.*, 68 Pa. St. 370; *New England Ex. Co. v. Maine Cent. R. Co.*, 57 Me. 188; *McDuffee v. Portland & Rochester R. Co.*, 52 N. H. 430; *Dinsmore v. Louisville C. & L. R. Co.*, 2 Fed. Rep. 465; *Southern Ex. Co. v. St. Louis, I. M. & S. R. Co.*, 10 Fed. Rep. 210, 3 Am. & Eng. R. Cas. 594; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365.

The liability of a railroad company as a common carrier for the transportation of goods and other articles begins just where any other common carrier's liability begins; that is, as soon as the goods are delivered to, and received by, it for transportation. *Southwestern Railroad Co. v. Webb*, 48 Ala. 585; *citing Marriam v. Hartford & New Haven R. Co.*, 20 Conn. 354; *Hannibal R. Co. v. Swift*, 12 Wall. (U. S.) 262.

FROSTBURG MINING CO.

v.

CUMBERLAND & PENNSYLVANIA R. CO.

(Court of Appeals of Maryland, March 26, 1895.)

Extension of Franchise.—The act of April 5, 1878, c. 409, entitled "An act to extend an act entitled 'An act to incorporate the Withers Mining Co.,' passed by the December session, 1847, Chap. 306," and which provides that such act, and one subsequent thereto, and amending the same, "be, and the same are hereby continued in full force and effect" for the period of 30 years, and which, after giving a new name to the company, provides "that the company of such name shall succeed to all the rights, powers, liabilities, and obligations of the" company as before named, did not create a new corporation. (*Page 569.*)

Duty of Carriers of Merchandise to Furnish Facilities [(1) p. 584]—**What Constitutes "Reasonable Facilities."**—The term "reasonable facilities," when used in connection with an act fixing the rate to be charged by a railroad company for the transportation of certain merchandise, and requiring it to furnish the means for forwarding and delivering same, means that such railroad company shall furnish the cars, motive power, and other conveniences necessary for such purposes. (*Page 570.*)

Effect of Special Statute upon Railroad Franchises Construed.—The act of 1878, c. 64, which requires the appellee in this case to "furnish reasonable facilities" for "receiving and forwarding all coals that may be offered for transportation" over its lines, was held not to be inconsistent with the act of 1849, c. 469, § 21, which limited the right to make connection with the roads of said company to the corporations thereafter to be incorporated, and it was further held not to repeal such section. (*Page 573.*)

APPEAL from Alleghany county circuit court. *Affirmed.*

Argued before ROBINSON, C.J., and BRYAN, FOWLER, MCSHERRY, PAGE, ROBERTS, and BRISCOE, JJ.

Benj. A. Richmond and *D. James Blackiston*, for appellant.
Robert H. Gordon, for appellee.

ROBINSON, C.J.—The question in this appeal is whether the appellant, a coal-mining company, has the right to make connection by means of a switch with the appellee's railroad, which runs by or near the property of the appellant. The appellee was chartered by Act 1849, c. 469, with power to build a railroad from Cumberland to the

Case stated.

Pennsylvania line. By section 21 of its charter, privilege to make connection with the appellee's road was reserved to any corporations which might "be hereafter incorporated, * * * provided that in making such connection no injury shall be done to the works of the company."

This privilege, it will be observed, is expressly limited to corporations chartered after the act of 1849, incorporating the appellee. The appellant was chartered by Act 1847, c. 306, for the purpose of manufacturing iron and mining coal, and was authorized to build a railroad from its property to to the Chesapeake & Ohio Canal, at Cumberland. Having been chartered prior to 1849, the appellant, it is clear, is not entitled to the privilege of making connection with the appellee's road, for the reason that this privilege was, by section 21 of the appellee's charter, reserved to corporations thereafter incorporated; that is, to corporations chartered since 1849.

The contention, however, is that the appellant was chartered for a period of 30 years, and that its charter expired March 8, 1878, and that by Act 1878, c. 409, passed April 5, 1878, a new corporation was created.

So the question comes to this: Whether the act of 1878 is to be construed as creating a new corporation, or as continuing or reviving the old company. "To ascertain," says Mr. Justice STORY, "whether a charter creates a new corporation, or merely continues the existence of the old one, we must look to its terms, and give them a construction consistent with the legislative intent and the intent of the corporators" (Bellows v. Hallowell, 2 Mason, 44 Fed. Cas. No. 1279); that is to say, whether the object of the act is to prolong or revive the existence of a corporation which has expired or is about to expire, and not to change the identity of the company or to form a new one, or whether the object is to create a new corporation, with a new capital, and with no intention to continue the obligations of the old company as against the company thus created.

Extention of
franchise.

What, then, was the object of the act of 1878? Its title declares it to be "An act to extend an act entitled 'An act to incorporate the Withers Mining Company,' passed at the December session 1847, chapt. 306," for the period of 30 years. And the enacting clause (section 1) provides "that the act entitled 'An act to incorporate the Withers Mining Company'

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and passed at December session eighteen hundred and forty-seven, chapter three hundred and six, and the act to alter and amend said original act of incorporation, passed at January session eighteen hundred and seventy, chapter two hundred and twenty-seven, be and the same are hereby continued in full force and effect for the period of thirty years." Not only does the title declare it to be the object of the act to extend the charter of the appellant for a period of thirty years, but the enacting clause provides in express terms that the charter be and the same is "hereby continued in full force and effect for the period of thirty years" from the 8th of March 1878.

It is clear, then, that the legislature meant merely to revive and extend the charter of the appellant, and did not mean to create a new and distinct corporation; and it is equally clear that this act was so understood and accepted by the corporators themselves. In pursuance of its provisions, a meeting of the stockholders was held at Frostburg on the 6th of May, 1878, and the company was organized by electing all the officers of the old company; and although the name of the company was subsequently changed from the Withers Company to the Thomas Mining Company, and then again to the Frostburg Mining Company, the legal title to the property still stands in the name of the Withers Company.

And, in making these changes in the name of the company, the legislature was careful to provide that the company by such name shall succeed to all the rights, powers, liabilities, and obligations of the said Withers Mining Company. It is clear, therefore, that the object of the act of 1878 was merely to revive and extend the charter of the Withers Company for a period of 30 years, and by no fair rule of construction can it be said to have created a new corporation.

But then, again, it is contended that section 21 of the appellee's charter, which restricts the privilege of making connection with its road to corporations chartered after 1849, is repealed by Act 1876, c. 64. This act, in the first place, prescribes the rates to be charged by the appellee for the transportation of coal over its road, and then it provides that it shall be the duty of the appellee "to provide and furnish reasonable facilities and all cars, including gondolas, where required for local trade, and other vehicles and motive power for receiving and for-

"Reasonable
facilities."

warding all coals that may be offered for transportation over said railway." And the argument is that the duty of furnishing reasonable facilities for receiving and forwarding coal that may be offered for transportation necessarily imposes on the appellee the obligation of permitting all persons and corporations having coal for transportation to make connections by means of a switch with its road.

To such a construction we cannot agree. The whole object of the act was to fix the rates to be charged by the appellee for the transportation of coal, and having fixed these rates, it makes it the duty of the appellee to furnish the means for forwarding and delivering the same. And reasonable facilities, as thus used, means that the appellee shall furnish the cars, motive power, and other conveniences necessary for such purposes. It would be a strained construction to hold that these words in themselves repeal section 21 of the appellee's charter, and impose upon it the obligation of permitting all persons and corporations having coal for transportation to make connections with its road. Such a construction is neither warranted by the natural import of the words "reasonable facilities" nor the subject-matter in connection with which they are used. It might just as well be said that the legislature meant to impose upon the appellee the duty of making stations at such places on its road as the shippers of coal might deem convenient to themselves, without regard to the business or interests of the appellee.

These precise words are used in the statute 17 & 18 Vict. c. 31, passed in 1854, and which provides "that every railway company * * * shall according to their respective powers afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways." And in construing this statute in *Southeastern Ry. Co. v. Railway Commissioners*, 6 Q. B. Div. 586, the lord chancellor said: "What, then, are the obligations imposed upon railway companies by this statute? * * * First, a positive obligation to afford, according to their respective powers, all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively." * * * 'Traffic, according to the interpretation clause (section 1), includes 'passengers and their luggage, and goods, animals, and other things conveyed by any railway

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company.' 'Railway' includes 'every station of or belonging to such railway used for the purposes of public traffic.' * * * With respect to stations there is no obligation to establish them at any particular places or place unless the company thinks fit to do so." BRETT, L. J.: "It follows that the defendants had jurisdiction only to hear and determine and order in respect of facilities to be afforded upon or from the railway or the stations used by the company for the purposes of public traffic."

And in *Great Western Ry. Co. v. Railway Commissioners*, 7 Q. B. Div. 182, where the complaint was that the company had charged rates in excess of those authorized by law, COTTON, L. J., said: "The complaint is simply that the charges made by the railway company for a great many of their journeys are beyond those which their special act of parliament or the general acts allow them to charge, and in that sense, and in that sense only, are excessive. Now, the only question we have to determine is whether this comes within the words of the second section of the railway and canal traffic act of 1854, on a reasonable interpretation of those words. They are that the company shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon their railway. Can this excessive charge be said to be a refusal of reasonable facilities? Now, what I think comes within those words, 'afford all reasonable facilities,' is the providing proper accommodation in the stations and in the carriages for the receiving and forwarding passengers, and for getting them in and out of their carriages, and the like."

The latest case in which the meaning of the words "reasonable facilities" has been considered is *Dorlaston Local Board v. London & N. W. R. Co.*, (Q. B. Div. and Prob. Div.) volume 2, Queen's Bench, decided July 9, 1894. In that case the railway company discontinued the use of a station, and pulled it down, and an application was made to the railway commissioners for an order requiring the railway company to afford reasonable facilities for receiving, forwarding, and delivering passenger traffic on this branch line, and to reopen the station, the use of which had been discontinued. Lord ESHER, M.R., said "that the commissioners had no power to prevent a railway company from absolutely pulling down a station if they think they ought, or if they choose to do

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it, any more than they can order a railway company to build a new station.

And, besides, there is nothing in the act of 1876 by which it can be fairly inferred that the legislature meant to repeal section 21 of the appellee's charter, which limited the right to make connection with its road to corporations thereafter to be incorporated. Section 1 of that act prescribes the rates to be charged by the ap-
pellee for the transportation of coal, and, having **Repeal of statute.**
thus prescribed the rates, the next section makes it the duty of the appellee to furnish all reasonable facilities for the receiving and forwarding of all coal that may be offered for transportation. These are the only amendments made to the appellee's charter. Not one word is said about amending or repealing section 21, by which the privilege of making connection with its road is limited to corporations thereafter to be incorporated.

It can hardly be necessary to say that the repeal of a prior existing act of the legislature by implication is never favored in law, and it is only when the two acts are repugnant and plainly inconsistent with each other that the rule applies. If the two acts can by a fair and reasonable construction stand together, there is no ground on which it can be held that the latter act operates as a repeal of the former act.

In this case there is no inconsistency whatever between the provisions of the act of 1876 and section 21 of the appellee's charter. On the contrary, the act deals with other matters in no manner affecting the provisions of that section. And, this being so, the doctrine of repeal by implication has no application.

For these reasons, the injunction prayed was properly refused, and the order of the court below will therefore be affirmed.

Order affirmed.

GULF, COLORADO & SANTA FÉ RAILWAY CO.

v.

HODGE *et al.**(Court of Civil Appeals of Texas, May 1, 1895.)*

Carriers of Merchandise—Duty to Furnish Facilities [(1) p. 584]—Failure to Furnish Cars According to Contract—Measure of Damages.—A railroad company in an action for failure to provide cars for the shipment of corn as agreed, is not liable in damages, both for the profits the plaintiff might have made had the corn been shipped as per contract, and the expenses incurred in preparing it for transportation, made necessary because of the delay occasioned by failure of the company to furnish cars. (*Page 577.*)

Same—Same—Defences to Action for Failure to Furnish Cars.—The fact that an unexpected increase in the volume of the business of a railroad company made it impossible for the company to furnish the cars contracted for, is no defence in an action to recover damages for breach of such contract. (*Page 579.*)

Action for Breach of Contract to Furnish Cars—Duty of Plaintiff to Lessen Damages by Contracting with Others.—A party who has secured a contract from a railroad company to furnish cars for the transportation of his property, is not required, in order to lessen the injury resulting from a breach of such contract, to secure some one else to fulfil the contract on the part of the railroad company. (*Page 579.*)

Station Agent—Authority of to Contract to Furnish Cars [(2) p. 585].—A railroad station agent has authority to bind the company by a contract to furnish cars at his station for the shipment of freight, but has no authority to make such a contract for shipments at other points. (*Pages 577, 580.*)

APPEAL from Bell county district court. *Reversed.*

The statement of the nature and result of the case in appellant's brief is as follows:

“ In their original petition, the appellees, being plaintiffs in the district court, alleged, in substance, that on September 20, 1892, they made a contract with J. Valegas & Bro., of Laredo, to deliver to the said firm of J. Valegas & Bro., at Laredo, Tex., between the 20th day of September, 1892, and the 20th day of November, 1892, 150 cars of sound, white corn, sacked in good sacks, f. o. b. Belton, or points taking the same rate of freight, at the price of 47½ cents per bushel, plaintiffs in said contract binding themselves to make daily shipments to said J. Valegas & Bro.

Facts.

of two cars, and to continue shipping until they completed the 150 car-loads, which must be delivered on said 20th day of November, 1892; that no cars would be received by the firm of J. Valegas & Bro. unless mutually agreed upon by the parties after the said date; that on September 20, 1892, plaintiffs notified the defendant of the terms of said contract, and stated to the defendant that plaintiffs proposed shipping all of the said corn, by its line of railroad and connecting lines, to the said point of destination, at Laredo, Tex., on or prior to November 20, 1892; that they on divers days, after the said date, and prior to November 20, 1892, demanded verbally and in writing of the defendant to furnish 150 cars for the shipment of the said corn, and defendant then and there continuously promised up to November 20, 1892, to furnish all of the said cars as requested, and held himself out as able and willing and bound to furnish said cars; that, in anticipation of and upon making the said contract, plaintiffs purchased a lot of machinery, consisting of an engine and two corn shellers, at a reasonable cost of \$891, \$300 for lumber with which to construct corn sheds; that the defendant knew of said purchase, and knew that all of such machinery would be damaged by depreciation in not less than one half of its cost price by use, and plaintiffs would suffer such damage in case they were not able to comply with their contract; that, had the contract been complied with, the plaintiffs would have made a net profit of \$40 per car on the corn; that defendants negligently, wantonly, and for the purpose of injuring plaintiffs, failed to furnish the cars as requested, and as said contract required, and only after continued urging furnished 39 cars between said period of September 20 and November 20, 1892; that during all of said time, while defendant was refusing to furnish cars as aforesaid to plaintiffs, it was well supplied with cars, which it was furnishing to the shippers who made demand for the same subsequent to demand made therefor by plaintiffs, and after demands made for said cars by plaintiffs from defendant; that after defendant had failed to furnish cars, and only furnished 39 cars during the period of shipment provided for in the contract, plaintiffs had on hand about 4000 bushels of corn, which they were compelled to sell at a loss of 20 cents per bushel; that, by the delay and refusal of defendant to furnish cars, plaintiffs lost the value of

Facts con-
tinued.

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their time, to their damage \$600; they lost the value of the use of their machinery for two months, to their damage \$600, and lost one half of the value of the said machinery, to their damage \$445; and they lost all the value of said lumber, to their damage \$300; that, by failure to ship 111 cars of corn, they were damaged in the sum of \$4440; that, on said 4000 bushels of corn sold at a loss of 20 cents, they were damaged \$800; wherefore they pray judgment in the sum of \$7185.50. Plaintiffs filed a trial amendment, in which they allege that the defendant was obligated to furnish cars to plaintiff to load corn to be shipped to Laredo, even if the same was required to be shipped over another and a connecting line of railway, because they say defendant was a private corporation, and as such duly authorized to make contracts for the shipping of goods and property, and bind itself thereby. Plaintiffs allege that before making any contract with J. Valegas & Bro., or immediately thereafter, the plaintiffs entered into a contract with the defendant, under terms of which the defendant was to furnish the plaintiffs a sufficient number of cars at Belton and Temple, Tex., and places taking the same rate, between September 20 and November 20, 1892,—150 cars for corn. Plaintiffs offered all of their corn to defendant, except one car shipped by the Missouri, Kansas & Texas Railway, upon which defendant protested, but, permitting said single car to be shipped as above, claimed the right to ship the balance of the corn as per terms of the contract. Plaintiffs allege that the other and connecting lines of railway were ready and willing to receive said cars of corn, and so notified defendant. The defendant's answer is sufficient to raise all of the questions made by the assignments of error, and hence a statement of the same is not necessary.

“ There were a verdict and judgment for the appellees as follows:

“ ‘ We, the jury, find for plaintiff as follows:	
111 cars of corn, at \$40.00.....	\$4440 00
Loss on 4000 bushels of corn.....	560 00
<hr/>	
Total	\$5000 00
“ ‘ [Signed]	H. A. WEAR, Foreman.’

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“The appellant’s motions for new trial and in arrest of judgment having been overruled, it has duly prosecuted this appeal.”

With one exception this statement is correct. The pleadings raise no issue of the plaintiffs’ assignment of the cause of action sued on.

J. W. Terry and C. K. Lee, for appellant.

Monteith & Furman, for appellees.

KEY, J. (after stating the facts).—1. Appellant’s special exception to some of the items of damage set up in appellees’ petition should have been sustained. Appellees cannot be permitted to recover the profit they would have made had there been no breach of the contract, and at the same time recover for the expense they would have incurred had the contract been performed by appellant. Had appellant performed its alleged obligation, appellees would have expended for machinery, lumber, labor, etc., as much as or more than they did expend; and therefore it is manifest that such expenditures were not a result of the breach of the alleged contract, and appellees cannot recover both the profit they would have made upon and the expenditures involved in procuring, shelling, and shipping the corn. However, as it is manifest from the verdict that the jury allowed appellees nothing on the items referred to, the error of the court in overruling the exception to the petition would not require a reversal of the judgment.

Failure to
furnish cars—
Damages.

2. As we construe the contract between the plaintiffs and J. Valegas & Bro., the plaintiffs were not required to deliver the corn at Laredo, Tex. They were bound, at their own expense, to place it on board the cars at Belton, Tex., or some other point having the same freight rate to Laredo. In other words, the contract required them to put the corn in such a condition that if not promptly transported to Laredo, Tex., a railroad company would be responsible to J. Valegas & Bro.; and if appellant had furnished the cars, and, when loaded, issued bills of lading according to the usual course of business, appellees’ contract with J. Valegas & Bro. would have been complied with, whether the latter ever received the corn or not. Hence, whether or not the station agent at Belton had authority to bind the appellant to transport the corn beyond

Station agent’s
authority to
bind carrier.

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its line of road is not believed to be material. It was within the scope of his authority to contract on behalf of appellant to furnish cars at his station for the shipment of corn or any other freight. *Easton v. Dudley*, 78 Tex. 236, 45 Am. & Eng. R. Cas. 340; *McCarty v. Railway Co.*, 79 Tex. 37; *Railway Co. v. Hume*, 16 Tex. Civ. App. 653; affirmed on this point by the supreme court in 87 Tex. 211.

3. This case, however, goes further, and presents a question which, in so far as the researches of counsel disclose and the information of this court extends, has never been decided by an appellate court in this state. The plaintiff's case is founded, not only upon a failure to furnish cars at Belton, Tex., but rests largely upon a failure to furnish them at Temple, Tex., another station on appellant's road; and the right to recover is based upon an alleged contract, and not upon the statutory right to have cars furnished within a reasonable time after written application. The testimony shows that the expectation was to ship a considerable portion of the corn from Temple; that cars were repeatedly demanded at that station; and that, at the time appellant finally refused to furnish any more cars, appellees had on hand a considerable quantity of corn at said station. No testimony was offered tending to show that the station agent at Belton had, or had ever been held out by appellant as having, any authority to transact any business for it at Temple or at any other point than his own station. Such being the case, it must be held that he had no authority to bind appellant to furnish cars or ship freight at any other station than Belton; and as the court, in effect, instructed the jury that a contract made by said agent to furnish cars at other points on appellant's road having the same rate of freight would bind appellant, which charge is assigned as error, the judgment must be reversed.

A local station agent, in charge of a railroad company's business at a particular station, is presumed to have authority to represent the company in all matters connected with the transaction of its business at that particular station; but he is not presumed to have authority to act for the company at other stations, and, when he attempts to do so, his act, unless ratified will not bind the company. In so far as we have been able to ascertain, such has been the holding wherever the question has been presented; and it is in harmony with the

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well-settled rule that a principal is not bound by a contract made by an agent that is not within the actual or apparent scope of the agent's authority. *Voorhees v. Railway Co.*, 71 Iowa, 735, 29 Am. & Eng. R. Cas. 322; *Railway Co. v. Stults*, 31 Kan. 752, 15 Am. & Eng. R. Cas. 97; 1 Lawson, Rights, Rem. & Prac. § 76.

We must therefore hold that appellees cannot recover upon the contract for any failure to furnish cars at any other point than Belton, unless it shall be proved that a contract binding upon appellant was entered into whereby it agreed to furnish cars at some other station. Other objections to the court's charge are not regarded as tenable.

4. The fact that an appellant, on account of an unexpected increase in the volume of business on its road or on those forming its connections, may not have been able to comply with its contract, is no defence to an action for a breach of the contract. *Railway Co. v. Hume*, 87 Tex. 211.

Inability to
furnish cars.

5. Appellant assigns as error the court's refusal to give the following special charge: "That it was the duty of plaintiffs, if they found defendant unable or unwilling to carry out their contract—if you find a contract was made as alleged—to use due diligence to get some other railway company, if there was any other, to carry out the contract; and, if you find they did not so use diligence or made no effort at all, then they are guilty of laches and contributory negligence on their part, and are not entitled to recover, and you will find for defendant."

Same—Duty
to employ
others to carry
out contract.

This charge was properly refused. Whatever the complaining party may be required to do to lessen the injury resulting from a breach of contract, he certainly is not required to employ some one else to do that which the contract bound the other party to do, and the failure to do which constitutes the breach sued on.

6. Appellant's answer put in issue the existence of the cause of action sued on, but it presented no question as to appellees' ownership of the cause of action, if any ever existed; hence, the proof, even without objection, that, after suit brought and before trial, appellees transferred their cause of action to a third person, not a party to the suit, constituted no defence. It is not necessary, therefore, to decide whether or not, had the trans-

Contract of
carriage—
Breach—
Ownership of
claim.

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fer been pleaded as well as proved, it would have defeated appellees' right to maintain this suit.

7. If the testimony of appellee Hodge concerning the authority of station agents was not admissible, its admission was harmless error. As before said, whether or not the station agent at Belton had authority to bind appellant to transport the corn beyond its own line is not believed by us to be material. He had authority to bind appellant to furnish cars at Belton; and if in proving a contract to so furnish the cars, appellees should also prove that said agent also undertook to bind appellant to carry the corn to Laredo, such additional proof would not impair the contract which the agent was authorized to make, and it would still be immaterial whether the agent had authority to contract for such through transportation.

Authority of
station agent
to bind carrier.

8. The form of the verdict is objected to, because it uses the term "plaintiff" instead of "plaintiffs"; but, as this question is not likely to arise again, we deem it unnecessary to decide it.

9. Part of the evidence complained of by the tenth assignment of error should have been excluded. Appellees charged in their petition that 4000 bushels of corn were left on their hands, which they sold at a loss of 20 cents on the bushel; but there was no averment that any of it was injured or lost by exposure, etc., and therefore the court erred in allowing appellees to testify to such injury and loss.

The judgment will be reversed, and the cause remanded, for further proceedings in accordance with this opinion.

Reversed and remanded.

CHICAGO & ALTON RAILROAD CO.

v.

DAVIS (William H.)

(*Supreme Court of Illinois, Nov. 25, 1895.*)

Carriers of Merchandise—Failure to Furnish Suitable Refrigerator Cars—Liability.—The liability of a railroad company for damage to perishable property resulting from defects in the refrigerator cars in which it was transported under the contract of carriage is not relieved by the fact that the cars were inspected by agents of the company from which the perishable property was purchased, the inspection being made by that company as the agent of the carrier, and not as that of the consignee. (*Page 582.*)

Same—Provision in Bill of Lading Limiting Carrier's Liability [(1) 677]—Effect.—A railroad company is not relieved from liability for loss of property caused by defects in refrigerator cars by virtue of a provision in the bill of lading limiting liability "for decay of perishable articles or injury by heat or frost," since, by contracting to use refrigerator cars, the carrier especially agreed to protect the goods from heat. (*Page 583.*)

APPEAL from appellate court, first district. *Affirmed.*

Lee & Hay, for appellant.

Eastman & Schumacher, for appellee.

CARTER, J.—This was an action on the case brought by appellee against appellant to recover damages for the negligence of the latter in transporting a car-load of green hams from Kansas City to Cincinnati, Case stated. whereby they were injured. The amount claimed in the declaration was \$1500. The cause was tried by the court without a jury, and judgment was rendered for the plaintiff for \$1051.46. The defendant took its appeal to the appellate court, where it was held that as to certain items, amounting to \$272.78, the judgment was erroneous—the damages, as assessed, being to that amount in excess of the damages actually sustained by the plaintiff; and, the plaintiff having remitted such excess, the judgment was affirmed as to the balance of \$778.68. 54 Ill. App. 130. The defendant then took this appeal from said judgment of affirmance.

Appellee has entered his motion here to dismiss the appeal

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on the ground that the amount involved is less than \$1000, and that this court is without jurisdiction to entertain the appeal. The motion having been reserved to the final hearing, it will now be first disposed of. The question arising on this motion was directly involved in *Gilmore v. Courtney* (wherein an opinion was filed at the October term, 1895), 41 N. E. 1023. We there held that the amount involved on the appeal to the appellate court being in excess of \$1000, an appeal lay to this court, notwithstanding the *remittitur* in the appellate court, whereby the judgment was reduced below that amount. This motion must be controlled by that decision, and it is therefore overruled.

Practice question.

The principal act of negligence complained of, and which on this appeal must be taken as proved, was that the refrigerator car furnished by appellant in which to transport the hams was defective, by reason of having a strip torn from the inside door, whereby warm air from the outside was admitted, melting the ice and heating the hams, so that they were in part spoiled en route. The order for the hams was sent by appellee from Cincinnati to Dunham, Norris & Co., brokers at Kansas City, and called for a car-load of green hams—of the Armour Packing Company's hams. Dunham, Norris & Co. placed the order with the Armour Packing Company. Appellant furnished the refrigerator car, and undertook to transport and deliver the hams. The evidence showed that, by the course of business between the packing company and appellant, appellant inspected its own cars in all respects, except as to their sufficiency as refrigerator cars. As to the latter features, the inspection was by the Armour Packing Company. The defect in the car was not apparent from the outside, but would readily be discovered on inspection. It was the duty of the carrier to provide a good and sufficient vehicle in which to carry the hams (*Railway Co. v. Dorman*, 72 Ill. 504; *Railway Co. v. Strain*, 81 Ill. 504; 3 Am. & Eng. Enc. Law, 16a), and this it undertook it to do. It could employ such agents to inspect its cars as it saw fit, and if, by special contract, or by its course of business between itself and the packing company it relied on the latter to inspect the refrigerating qualities of its cars, that was a matter between itself and the packing company, and did not concern appellee. The mere fact that ap-

Defective refrigerator car.

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appellee purchased the hams from the packing company did not relieve the appellant from its duty to provide a safe and suitable car in which to transport the hams.

The rule that in making the contract for transportation the consignor acts as the agent of the consignee would not apply in this case to the question under discussion; for the evidence tended to show, and it must be taken in this court as established, that in the selection and inspection of the car the packing company acted as the agent of appellant, and not of appellee. And as the loss occurred by reason of a defect in the car, and not from any defective or improper manner of loading the car, or of packing the hams therein, the negligence complained of cannot be ascribed to appellee or his agents. So that the case is presented of the injury having occurred by reason of the negligence of appellant in not providing a safe and suitable car in which to transport the hams.

To the ordinary mind, liability would seem to follow as a matter of course. But it is claimed that appellant limited its liability by the bill of lading, which provided that the carrier should not be liable "for decay of per- **Limiting of**
ishable articles, or injury by heat or frost." **liability.** This provision in the bill of lading did not purport to provide against the liability of the carrier which would arise from its own negligence in furnishing a defective vehicle for carriage. The refrigerator car was specially intended to safely transport articles which were in their nature perishable from heat. Appellant undertook to furnish such a car, suitable for the transportation of such articles; and it could not, in reason, be contended that this provision was intended to relieve appellant from its duty to do the very thing which it was otherwise bound to do, and without which the property would, as it well knew, be destroyed in transit, and the whole purpose of the transportation be defeated.

Besides, conceding that common carriers may by contract limit their common-law liability, as we have held in many cases (see *Railway Co. v. Chapman*, 133 Ill. 96, 42 Am. & Eng. R. Cas. 392, where these cases are reviewed), still, unless the shipper accepted the bill of lading, and understood and assented to the provisions restricting the carrier's liability, he would not be bound by such restrictive provisions. And whether or not he understood and assented to such restrictive provisions in the bill of lading is a question of fact, and is con-

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clusively found against appellant by the judgment of the appellate court. *Railway Co. v. Montfort*, 60 Ill. 175, and cases there cited; *Transportation Co. v. Joesting*, 89 Ill. 152; *Transportation Co. v. Dater*, 91 Ill. 195.

What has been said sufficiently disposes of the questions raised by counsel respecting the propositions of law held, refused, or modified by the trial court. Finding no error in the record, the judgment of the appellate court will be affirmed.

Judgment affirmed.

NOTES

(1) **Duty of Carriers of Merchandise to Furnish Proper Facilities for Conduct of its Business.**—A railroad company by the very act of accepting goods for transportation thereby enters into an implied undertaking to furnish such cars and exercise such diligence as may be necessary for the safe transportation of such property. *Merchants' Dispatch Transp. Co. v. Cornforth*, 3 Colo. 280, 25 Am. Rep. 759; *Wing v. New York & E. R. Co.*, 1 Hilt. (N. Y.) 241; *Ogdensburg R. Co. v. Pratt*, 22 Wall. 123; *Hawkins v. Great Western R. Co.*, 17 Mich. 62, 18 Mich. 427; *Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 Me. 235.

It is the duty of every railroad company to provide such conveyances by special cars, or otherwise, as are required for the safe and proper transportation of goods on its road. *Southern Exp. Co. v. St. Louis, I. M. & S. R. Co.*, 10 Fed. Rep. 210, 3 Am. & Eng. R. Cas. 594.

The mere presence of the owner of a shipment will not lessen the responsibility of the railroad company if the owner has no power over the train, nor right to make any change in the disposition of the cars. *Peters v. New Orleans, J. & G. N. R. Co.*, 16 La. Ann. 222.

A railroad company engaged in the business of transporting merchandise and live stock, and accustomed to furnish suitable cars therefor, is bound to furnish such cars upon reasonable notice whenever it can do so with reasonable diligence without jeopardizing its other business. *Ayres v. Chicago & N. W. R. Co.*, 71 Wis. 372, 35 Am. & Eng. R. Cas. 679; *citing Texas & P. R. Co. v. Nicholson*, 61 Tex. 491, 21 Am. & Eng. R. Cas. 133; *Chicago & A. R. Co. v. Wrickson*, 91 Ill. 613; *Ballentine v. North Missouri R. Co.*, 40 Mo. 491; *Guinn v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 453.

It is the duty of a railroad company which undertakes to carry live animals for hire, to provide cars of sufficient strength to prevent the animals from breaking through the same, and the company will be responsible for a loss occurring through its failure to do so although the animals were unruly and vicious; but it will not be

Notes

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responsible for an injury to the animals occurring simply from their own viciousness or unruliness while being carried in a proper car. *Smith v. New Haven & N. R. Co.*, 94 Mass. 531.

The want of cars of sufficient strength to safely carry and deliver at destination the merchandise or live stock entrusted to a carrier, is negligence for which the carrier will be responsible in case of any loss occasioned thereby. *St. Louis & S. E. R. Co. v. Dorman*, 72 Ill. 504.

A railroad company acting as a common carrier is liable for damages resulting from defective and unsafe cars or vehicles of transportation, notwithstanding an express contract to the contrary. *Welsh v. Pittsburgh, Ft. Wayne & C. R. Co.*, 10 Ohio St. 65.

The obligation which the law imposes upon a common carrier of freight and live stock to provide itself with all reasonable facilities and appliances for the transportation of such goods and stock as it holds itself out to the public as ready to engage in carrying, when offered, is not met by the excuse of delay because of the disabling of a bridge on its line, so that it was forced to reach its destination by another and more circuitous route. *Guinn v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 453.

It is the duty of a railroad company to provide a suitable mode of delivery of live stock, or goods, from the cars to the platforms, by having suitable appurtenances or movable platforms for that purpose, and especially when unloading live stock. *Owen v. Louisville & N. R. Co.*, 87 Ky. 626, 35 Am. & Eng. R. Cas. 687.

A common carrier is under legal obligations to furnish suitable and sufficient workmen to properly and promptly handle merchandise in its care of shipments. A strike of its employés, there being no violence, riot, or unlawful interference with other employés, is not sufficient to release the carrier from these obligations. *People v. New York Cent. & Hudson River R. Co.*, 28 Hun (N. Y.) 543.

(2) **Authority of Agent to Contract to Furnish Cars.**—The general freight agent of a railway company has power to bind the company by contract for transportation to points beyond its own line; but a local station agent has no such power, and such a contract entered into by him is void unless the authority has been expressly conferred by the proper superior officer, or there have been previous dealings from which the authority may be reasonably inferred, or the company has held itself out as a common carrier to such points. *Grover & Baker Sewing Mach. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672.

Although the local station agent of a railroad company has no authority to contract for transportation beyond the terminus of the line of his railroad, yet when the railroad company has made other similar contracts prior to the one in question, being represented by the same station agent, and which contracts have been recognized and carried out by the defendant, this is a "course of dealing between plaintiff and defendant's agent from which the authority of

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the agent to make the contract might be inferred." *White v. Missouri Pac. R. Co.*, 19 Mo. App. 400; *citing* *Grover & Baker Sewing Machine Co. v. Missouri Pac. R. Co.*, 70 Mo. 672; *Loomis v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 340.

In the laying down of the foregoing rule the court in this case found, as an additional reason for sustaining this rule in this particular action, that the general freight agent of the defendant railway company, who had unquestioned right to make such a contract, had recognized the validity of the contract in issue, and this was held to be a ratification thereof, sufficient, of itself, to bind the company.

MIDLAND NATIONAL BANK

v.

MISSOURI PACIFIC RAILWAY CO.

(Supreme Court of Missouri, Div. No. 1, Dec. 11, 1895.)

Carriers of Merchandise [(1) p. 565]—Bills of Lading [(1) p. 608]—Liability Thereon.—A carrier of merchandise which issued original bills of lading in dual form, and which declared that the consignment is in its possession, and is to be delivered only upon the presentation of such bills, and is not conditioned to be void in the event of a delivery upon duplicate bills issued for protection, is liable on its original bills of lading to the *bona fide* assignee of the same, for a valuable consideration, notwithstanding that it has already delivered the property to the shipper upon the presentation of one of the duplicate bills. (*Page 590.*)

Same—Same—Custom at Place of Delivery as Affecting Rights under the Original Bill of Lading.—Under such a bill of lading a custom and usage at the place of delivery of the property, of never delivering a consignment without the surrender of the original bills, and the like custom and usage of loaning money on such original bills is not a factor in determining the liability of the carrier on such bills to a *bona fide* holder thereof under a written consignment, as security for a loan, where the carrier has delivered the consignment to the shipper on presentation of the duplicate bill alone. (*Page 590.*)

Same—Same—Surrender by a Pledgee of an Original Set of Bills of Lading, given as Security for Loans, for other Bills—Effect on Rights.—The surrender of a former set of bills of lading held as security for a loan, and the substitution therefor of other like bills to be also so held, does not affect the rights of the pledgee as founded upon the original contract. (*Page 592.*)

Same—Same—Liability of Carrier on Original Bill of Lading Irrespective of Local Custom as to Honoring Duplicate Bills.—Where a carrier of merchandise issues bills of lading in original and duplicate, the fact that the local custom in the place of delivery is for the consignee to take possession of the consignment within a specified number of days after notice of its arrival does not release the carrier from liability on the

original bill, conditioned for delivery of the consignment on its presentation, for a delivery of such consignment to the holder of the duplicate. (*Page 593.*)

APPEAL from Jackson county circuit court. *Affirmed.*

Elijah Robinson, for appellant.

Lathrop, Morrow, Fox & Moore, for respondent.

ROBINSON, J.—This is an action by the Midland National Bank of Kansas City, as pledgee of 20 bills of lading issued by the Missouri Pacific Railway Company, against said railway company, for failure to deliver to it the 20 car-loads of grain covered by the bills of lading. Case stated.

The petition contains 40 counts, every consecutive odd and even count thereof being based upon the same bill of lading, and all substantially the same, with the exception of the description as to the particular character of grain in each car, its value, and the car number containing same. The case was tried by a jury, and, after the testimony was all in, the court directed the jury to return a verdict for plaintiff, for which alleged error on the part of the trial court the appeal is chiefly prosecuted.

The following are the substantial averments of plaintiff's petition: "That during the months of September and October, 1891, defendant received the cars of grain at Paola, Kansas, consigned to the order of the shipper at Kansas City, Mo., and the issuance by defendant of shipper's order bills of lading, covering each car separately; that the various cars of grain, by the terms of these bills of lading, were to be delivered to the order of the Courier Commission Company, at Kansas City, Mo.; that the commission company negotiated a loan of plaintiff, and pledged the 20 original shipper's order bills of lading, duly indorsed, as collateral security for said loan; and that plaintiff presented said bill of lading to defendant and demanded the grain called for in said bills, which was refused, to the plaintiff's damage to the value of the grain," etc. In each of the even-numbered counts of the petition plaintiff set out, in addition to the above facts, the existence of a general custom in Kansas City. in all cases when grain is shipped to that city on bills of lading similar to those herein mentioned, where delivery is to be made to shipper's order, for the railway companies, on the

Facts—Petitions.

Bills of Lading

Midland Nat. Bk. v. Mo. Pac. Ry. Co.

delivery of such grain, to take up such bills of lading, and that such custom was at all times known to defendant; and that during all said time a general custom had obtained in Kansas City of loaning money upon the security of grain in the hands of the railroad companies on bills of lading similar to these sued on here, when grain is to be delivered to shipper's order, and of receiving such bills of lading as evidence of the ownership of said grain, which custom was known to defendant; and that, in accordance with, and relying upon, such custom, the plaintiff made the loan to the Courier Commission Company, and that, by reason of the custom, defendant became obligated to deliver said grain to plaintiff on the production and offer to surrender the original bills of lading so issued by it, and is now estopped from refusing to so deliver said grain, etc.

In our view of the law governing such instruments and the rights of indorsers thereunder, the matter of custom so set up in the plaintiff's petition, as well as the countervailing custom pleaded by defendant in its answer, will count for but little in the determination of the real issues involved; and, in eliminating them now, as factors not to be considered, many minor questions raised by defendant, as to alleged error of the trial court in admitting and excluding testimony offered on those questions, are made of no consequence, as its admission or exclusion could affect only nonessential issues raised by the pleadings.

**Minor issues
disposed of.**

Defendant, in its answer, admitted the execution and delivery of the bills of lading sued on to the Courier Commission Company, and that the commission company, by indorsement in writing, had transferred same to plaintiff before the institution of this suit, and that plaintiff was now the holder, and in possession, of same, and had made demand upon it for the grain called for in the bills of lading in suit, and that it had refused to deliver same to plaintiff, but denied that plaintiff had purchased and paid for same, as alleged in its petition. And, further answering, alleged that, when the grain mentioned in the bills of lading sued on was delivered to it for shipment, it issued bills of lading in sets,—that is, three bills of lading for each car,—and that, soon after the issuance of the bills, it in good faith delivered the grain covered by said bills of lading to the owner thereof, the Courier Commission Company, on the sur-

Facts continued—Answer.

render to it of one set of said bills of lading by the Courier Commission Company; that, subsequent to the delivery of said grain by it to the commission company, the plaintiff obtained possession of the bills of lading sued on, and that at the time it got possession of same, it knew, or, by the exercise of ordinary care, caution and prudence, could have ascertained, that the grain called for in said bills of lading had been delivered by the defendant to the commission company, and that said bills were no longer valid; that, at the time when said bills of lading were received by plaintiff, there was, and for a long time prior thereto had been, prevailing in Kansas City, among all the railroad companies which were then in the habit of shipping grain into Kansas City, and particularly with the defendant, a custom whereby the owner of grain so shipped to said city was required to receive and take possession of the same within six days after its arrival in said city, and that said plaintiff, when it received said bills of lading, was aware of such custom, and must have known, if it had exercised reasonable care and diligence, that said grain had, long prior to that time, been delivered to the owner thereof; further, that, upon the grain being delivered to the commission company by the defendant, said company shipped same to other points, and received from defendants and other railroad companies in Kansas City bills of lading therefor, and that afterwards the commission company attached said bills of lading to drafts, and delivered the same to plaintiff, who caused said grain to be sold, and received the proceeds thereof.

Plaintiff then filed its reply, alleging the existence in Kansas City of a general custom that shipments of grain and other property consigned to and arriving in Kansas City, billed to the order of the shipper, were deliverable only upon the production, surrender, and cancellation of the original shipper's order bills of lading; and that, if any delivery of the grain in controversy was made by the defendant to the Courier Commission Company, it was made without the production, surrender, and cancellation of the original shipper's order bill of lading, in violation of said custom, upon which plaintiff relies; and that defendant, by reason of the premises, was estopped from claiming or showing a delivery without the production and surrender of

Facts continued—Reply.

Bills of Lading **Midland Nat. Bk. v. Mo. Pac. Ry. Co.**

the original shipper's order bill of lading,—coupled with a general denial of new matter set up in the answer, etc.

The question as to the good faith of the defendant in the matter of delivery of the grain in controversy to the Courier

Bill of lading ordinary care and prudence on part of plaintiff, it
—Liability might have been able to have ascertained the fact
thereon. regarding the delivery of the grain by defendant

to the Courier Commission Company, is in no wise controlling, and cannot be used to defeat plaintiff's right of action as holder for value. The rights of the parties to this litigation must be determined by the contract of affreightment issued by the defendant company to the Courier Commission Company, unless the plaintiff, or some holder of the bills before it, has done something, with the knowledge of the plaintiff, whereby defendant was discharged from its obligation; and no custom practiced and maintained by the defendant and other railway companies at Kansas City can prevail against the express language of their contract of affreightment to affect the rights of the holder by endorsement thereof, or in any wise limit the liability of the defendant thereon, unless such custom had been exercised, and plaintiff had purchased or received the bills with a knowledge of that fact.

The fact that a rule was in force among the railroads at Kansas City at the time of this transaction, and further, that from its general enforcement and practice, a custom

Same—Custom had thereby been established that was known to
of place of plaintiff, to the effect that grain and produce
delivery, how shipped to Kansas City was to be received by the
affects rights. consignee within six days from the date of its ar-

rival on the tracks there, would not excuse or justify the misdelivery of the goods by defendant, or relieve against the express language of the contract of affreightment to deliver to the "shipper's order." If the plaintiff did nothing to mislead defendant, it had the right to rely upon the fact that it held the bills of lading, and that, according to the ordinary course of business, the grain could not be obtained except upon their production. The custom pleaded by defendant could do nothing more than impose upon the consignee or the holder of the bills by indorsement the expense of paying for the storage of the grain after the sixth day of the arrival of same at Kansas City, and could in no sense be said to operate,

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influence, or control the question of the delivery and disposition of the grain to other than the rightful owner, except for storage purposes. In other words, the question of where defendant might store the grain, and what burdens he might impose upon it, after the sixth day of its arrival, and non-acceptance by the owner, according to a prevailing custom at Kansas City, in no way affects or controls the question as to who is entitled to the grain, or the question as to whom defendant had contracted to deliver the grain under the bills of lading issued by it. Nor can the fact that the defendant in good faith delivered the grain covered by the bills of lading in suit to the commission company, knowing that they were the original shippers and consignees named in the bills of lading, as they had oftentimes done before, on surrender of the duplicate bills of lading merely, avail defendant anything in this action, if the bank, the holder by indorsement and assignment of the original bills of lading, were ignorant of the fact.

If the defendant, trusting to the former fair dealing and integrity of the commission company, saw fit to deliver to it, or to rebill the cars of grain to other points for the commission company, and issue other bills of lading for same, without requiring the production of the original bills of lading issued at Paola, Kan., and now held by plaintiff, it took the risk of the truthfulness of the Courier Commission Company's statements as to who was the owner of the grain, and cannot now avoid it, and lay its burden upon the shoulder of the bank, without it can further show that the bank did something to deceive it, and lead it into the error it committed in thus delivering the grain to the Courier Commission Company.

By the admissions of defendant in its pleadings, supplemented by the positive proof of its witnesses, the plaintiff was the holder for value, by written indorsement thereon and the delivery thereof, of the bills of lading sued on; and, if so, then the admission by pleading, supplemented by defendant's own testimony, fixes its liability, and it was the duty of the court to give legal effect to such facts by instruction, and the jury were only left to ascertain the amount of the liability, as was done in this case. If plaintiff is the holder by indorsement of the bills of lading, then it owned the grain covered by them, and defendant cannot excuse itself by saying that

Original bills
of lading
determine
shipper's
rights.

Bills of Lading Midland Nat. Bk. v. Mo. Pac. Ry. Co.

plaintiff did not present its bills in a reasonable time, and that, by reason of that fact, it turned over the grain to the consignee on the simple surrender of its duplicate bills, or rebilled same to other points, without the production, surrender, or cancellation of the original shipper's order bills of lading.

Defendant next contends that the notes held by the bank show upon their face that the money represented by them had been advanced by the bank to the Courier Commission Company long prior to the time when the bills, or a part of them, at least, were or could have been received by the bank, and that, as a consequence, the money could not have been advanced on the faith of the bills of lading in suit, as alleged in plaintiff's petition; which, in a limited sense, is true, but not in the sense that it was taken as collateral security for an antecedent pre-existing indebtedness. The testimony of the officers of the bank, as well as Mr. Courier, of the Courier Commission Company, called in behalf of the defendant, was that these bills of lading were delivered as security, under an agreement between the bank and the commission company that advancements would be made by the bank, from time to time, to the commission company, as its necessities would require; or that they were given in exchange for like collateral that had been previously deposited with the bank for money advanced. The fact that there was a change in the collateral, some of the bills of lading being withdrawn, and part of those in suit being put in their place, will not alter plaintiff's relation to them, or his rights of action thereon as against defendant.

The surrender of a former set of bills of lading was a consideration for the pledge of those in suit, so taken in exchange therefor, and the plaintiff continues to be a *bona fide* holder for value of the substituted bills, although antedating the loan secured. The rule is stated thus in Colebrooke, Collat. Sec. § 15: "The exchange or substitution of other securities for those originally delivered as collateral has no effect upon the rights of the pledgee, as founded upon the original contract. The surrender of the securities originally deposited is a valuable consideration for the giving of new securities, and the pledgee is, as to the latter, a holder for value, in the usual

**Substitution
of bills of lad-
ing for others,
as security for
loan—Effect.**

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course of business. Such exchange and substitution is sometimes of the utmost benefit to the pledgor, and is supported as against creditors, for the reason that they are not harmed thereby. Even after a pledgor is known to be insolvent, such exchange and substitution of securities is valid, if made *bona fide*; the pledgee receiving securities of no greater value than those surrendered."

While it is true, as contended by appellant, that, as these bills of lading were issued in the state of Kansas, this cause is not to be determined by the provisions of our statute affecting such instruments, it is not true, as further contended by appellant, that, by the rules of the common law, where bills of lading are presented by the person therein named as the party to whom the goods are to be delivered, the delivery to such person is valid, although the party presenting the bills is the holder of only the duplicate or triplicate set of bills, and the original had been surrendered to a *bona fide* pledgee or purchaser for value. Our statute not only provides that bills of lading are made negotiable by written indorsement thereon and delivery thereof, in the same manner as bills of exchange and promissory notes, but to the demands of the business and commercial world went a step further, and provided "that no prescribed or written condition, clause, or provision inserted in, or attached to, any such bills of lading or contract shall in any way limit the negotiability, or affect any negotiation, thereof, nor in any manner impair the rights and duties of the parties thereto, or persons interested therein; and every such condition, clause, or provision purporting to limit or affect the rights, duties, and liabilities created or declared in the chapter shall be void, and of no force or effect,"—thus making it unavailing to the carriers to issue bills of lading with such clauses and conditions as have been incorporated in many heretofore issued, and in the consideration of which courts have announced propositions similar to that announced by appellant; and those rulings and utterances of the court in turn have been taken, in many instances, as the general doctrine governing such instruments, and the rights and duties of the parties thereunder, in cases when the conditions and obligations under the bills of lading have not been restricted or conditional, as in the original case that gave birth to the oft-quoted doctrine.

Bills of lading
in duplicate—
Holder of
original bill
entitled to
property.

Bills of Lading

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Numerous cases may be found where the doctrine is announced in a general way that, "when goods are shipped under bills of lading drawn in parts, to be delivered to the consignee or his order, or assigns, the carrier is justified in delivering to the consignee, on production of part of the bill of lading, although there has been a prior indorsement for value to the holder of another part, provided the delivery be *bona fide*, and without notice or knowledge of such prior indorsement; and we have been referred to the case of Glyn, Mills, Currie & Co. v. East & West India Dock Co., 7 App. Cas. 591, decided by the house of lords, when all the judges rendered separate opinions, and reviewed quite fully the most prominent adjudications on that subject for the past century in their court, as well as many of the other English appeal courts, as sustaining defendant's contention.

While Lord SELBORNE, L.C., in that case says: "It is clear that the shipowner may be discharged by a *bona fide* delivery, under the terms of his contract with the shipper, to a person who is not the true owner, and I think there is no sufficient reason for refusing him the benefit of his contract, when the part of the bill of lading on which he makes a like *bona fide* delivery is not indorsed,"—it must be borne in mind the nature and condition of the contract he is construing, and the contention of the parties to that litigation. This was a suit for damages by bankers in London—to whom the shipper had indorsed in blank the bill of lading marked "First" of a set of three bills affirmed by the master, all of the same tenor and date, with this condition inserted therein: "The one of which bills being accomplished, the other to stand void"—against a dock company, to whom the goods had been turned over for storage, for delivering them to the shipper on his presenting the bill marked "Second," not indorsed; the bill marked "First" having before that time been duly indorsed for value to the bank, but not known to the shipowner or the dock company, who held the goods for him.

The same learned judge, further on in his opinion, uses this language, that clearly indicates the governing consideration in the mind of the court while using the general language above quoted: "It is for the benefit of the shipper that the right to take delivery of the goods is made assignable, and it is for the benefit and security of the shipowners that, when

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several bills of lading, all of the same tenor and date, are given as to ~~the~~ same goods, it is provided that, 'one of these bills being accomplished, the others are to stand void.' It would be neither reasonable nor equitable, nor in accordance with the terms of such a contract, that an assignment of which the shipowner has no notice should prevent a *bona fide* delivery under one of the bills of lading produced to him by the person named on the face of it, as entitled to delivery, in the absence of assignment, from being a discharge to the shipowner."

And again, to explain the question prominent before the court in that case, we will quote from the opinion delivered by Earl CAIRNS at the same time, and in the same court: "Then, what has the shipowner to do? The shipowner has to protect himself from that which is liable to cause difficulty or embarrassment to him; and the way in which, as it appears to me, he does protect himself is by stating that, although 'the master or purser hath affirmed to three bills of lading,'—that is to say; has signed three bills of lading,—'all of the same tenor and date,' yet, notwithstanding that fact, 'one of these bills of lading being accomplished, the others shall stand void'; which I understand to mean that, if, upon one of them, the shipowner acts in good faith, he will have 'accomplished' his contract,—will have fulfilled it,—and will not be liable or answerable upon any one of the others. If one is produced to him in good faith, he is to act upon that, and not to embarrass himself by considering what has become of the other bills of lading. That appears to me to be the plain and natural interpretation of these words, having regard to the purpose for which they are introduced." Thus it will be seen that, while there are authorities using the exact language as used by defendant in its assertion as to the correct rule governing the duty, liability, and responsibility of the carrier to the holders of bills of lading issued by it, there must always be kept in mind the peculiar phraseology of the instrument to be construed. Much of the conflict of the courts on this subject has been due to an attempt to apply the rule announced in a particular case to the general doctrine governing bills of lading. In the case just referred to, the bills of lading bore this *caveat* and contract on each of the sets issued: "The one being accomplished, the others to stand void,"—thus furnish-

Same—Au-
thorities ex-
amined, con-
tinued.

Bills of Lading

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ing an ample beware to the money loaner, and ~~at~~ the same time a full protection by contract to the carrier.

Under such circumstances, the carrier, in delivering the goods, on production and surrender of either one of the sets of three bills of lading issued, performed his contract, which was in that particular a restriction and limitation on the otherwise negotiable and assignable character of such instrument, which, until prohibited, as in this and many other of the states, by statute, was permissible and lawful. In the present case no such contract appears in the bill of lading issued by defendant, and no such qualifying words restrict its negotiability.

We think the right of the holder by indorsement for value of an original bill of lading goes much further, in a contest like this with the carrier, than was announced by this court in the case of *Skilling v. Bollman*, 73 Mo. 665, cited and so much relied on by defendant. In that case the court simply declared that, when triplicate bills of lading had been executed by the carrier to the order of the shipper, of which two were delivered to the shipper, and one of the delivered bills of lading had been indorsed to the plaintiff for value before the shipper sold and delivered the goods covered by it to defendant, the plaintiff should recover against the defendant the value of the goods, his bill of lading being prior to defendant's purchase and receipt of the goods from the shipper. That case involved simply the question of priority of rights between two independent purchasers of property, or the purchasers, in one case, of the symbol or representative of the property, and the purchase of the property itself. While that case was properly decided, it does not reach the facts of this case. Then it was a question of the priority of right between two parties in no wise connected with, or responsible for, the issuance of the bill of lading.

Here a different principle is involved. The contest is between the defendant company, who issued and gave life to, and set afloat, this bill of lading, and the plaintiff, the holder of it by indorsement for value. The question as to whether defendant disposed of the grain before plaintiff purchased the bills of lading can effect nothing, except for showing plaintiff's knowledge of the fact, and his bad faith in the purchase thereafter. After plaintiff had dealt with the commission company upon the legal assurance, as declared in the bills of

Holder, by
indorsement,
of original bill
--Rights.

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lading now held by it, that the grain was in defendant's possession, to be delivered only on the presentation of the shipper's order bill of lading, and had given credit and advanced money on the strength of the announcement and contract therein made by the defendant, it is inequitable that defendant could be now heard to say: "I have delivered the grain to the consignee," in violation of law and of the customs prevailing in Kansas City regarding the surrender and delivery of such property. While bills of lading before the adoption of our statute were not negotiable in the full sense as notes and bills of exchange, still by the words "consignee, or order, or assigns," an authority to dispose of it by indorsement was manifest on its face, and a person or company who issues it ought, on all principles of estoppel, to be denied the right to be heard, as against the holder, to say: "True, we made and promised to deliver to the consignee, or his order or assign, but a misdelivery has happened to us by trusting to the word of the consignee, and we ought not now to suffer."

Applying to this case the familiar principle "that, where one or two innocent persons must suffer by the act of a third, he should suffer who, by his conduct, has made it possible that the damage should be sustained," how would it affect the parties to this litigation? Assuming that both are equally innocent, the blame must fall on defendant, because it was its act in failing to comply with its duty that made it possible that plaintiff should have invested its money in bills of lading which defendant now seeks to dishonor. In issuing these bills of lading, defendant said to the business and commercial world: "We hold twenty cars of grain, delivered to us by the Courier Commission Company, which will be retained by us for the company or its assigns, by indorsement in writing, and none of the grain therein will be delivered to any one, except on the surrender and cancellation of those bills of lading." And now, after thus announcing to the world these facts by the issuance of its bills of lading, which are symbols of the property in its custody, and the muniments of title thereto in the hands of the holder thereof, can it afterwards say to the holder of these symbols, which represent and stand for the property itself: "True, we said that we had the property, and that we would hold it subject to be delivered only to the holder of the instruments issued by us, but we ought not now to be held to that agree-

Same—Controlling principles.

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ment, because we have carelessly, but in good faith, delivered the same to the original shipper;" or what is the same, at its request rebilled the grain to another point without this state, not requiring the production, surrender, and cancellation of the original shipper's order bills of lading; or, what is equally untenable as an answer, "because you, [the plaintiff] as holder of those bills, did not present them as soon as the grain reached Kansas City."

If, under ordinary circumstances, the failure to present, on the part of the holder, bills of lading indorsed as in the case of the ones in suit, to the carrier within a reasonable time after the cars containing the property have reached their destination would have authorized the delivery of the property to the original shipper,—which is not true,—still, under our statutes, full and ample provision is made to cover just such a condition of things by section 6806 of the Revised Statutes, which provides "that when any goods, merchandise or other property shall have been received by the owner, consignee or other authorized person, it shall be lawful to hold the same by said carrier," etc., or the property may be stored with some responsible person, and be retained until the freight and all just charges be paid.

By reason of the negotiable character of the bill of lading, as well as by the practices and necessities of the commercial world, the assignees of same may oftentimes be said to have a better title, and stand in a better position as to the property named in the bill of lading, than the assignor himself had at the time of the transfer by indorsement. Since the assignor, as holder of the bill of lading, is entitled, on its face, to receive the property named therein on presentation of the bill of lading issued by the carrier, and known by the carrier to authorize the holder thereof by indorsement to receive, on presentation of same, the goods therein named as owner, the assignee may be said to have rights superior and greater than the assignor of the bill. The assignor might, in fact, as defendant claimed the Courier Commission Company had no right to the property named in the bills of lading, have had no right to the property by reason of the property having been reshipped, and new bills of lading issued to it for the same, or on account of equities that might exist between the shipper and carriers to defeat the shipper's right to recover the property. The Cou-

Superior
rights of as-
signee of bill
of lading.

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rier Commission Company was in the actual, authorized possession of those bills of lading issued by the defendant, which, in the growth and development of commerce and commercial credit, have come to represent the property itself, so that a transfer of the instrument operates to transfer the property. Being armed with these muniments of title and these symbols of property, which, by written indorsement, are negotiable, the holder of the bill is capable of diverting the property of the owner, and vesting it in the indorsee, although he had previously disposed of it to another, provided the indorsee was ignorant of the equities; in this possessing some of the attributes and qualities of a negotiable bill of exchange.

By these means the property was put under the power and control of the Courier Commission Company for disposition, without the actual delivery of the property itself to its assignee or vendee, and that, too, after an actual delivery might have been made to it or another, should the carrier deliver same to the purchaser without taking up the muniments of title outstanding in the hands of the shippers. If the defendant permitted the Courier Commission Company to remain in possession of these bills of lading after the grain had been reshipped by it for the Courier Commission Company, thereby holding it out to the world as having the right to deal with the property, it will be estopped from denying that title and ownership of property in the hands of an innocent purchaser, pledgee, or mortgagee. By delivering the grain to the Courier Commission Company, or by rebilling and reshipping it for the company, the defendant became liable to plaintiff, unless it can show some valid excuse.

The record shows no laches—no act of omission or commission—of plaintiff which would authorize the misdelivery, or excuse the non-delivery, of it. The case of *Barber v. Meyerstein*, L. R. 4 Eng. & Ir. App. 317, in commenting on the question of an indorser's laches, says: "It is quite immaterial when a man has got both the right of property and the right of possession passing by a symbol,—the bill of lading,—which is at once both the symbol of the property and the evidence of the right of possession. When the evidence of his title is thus complete, there is no obligation on him to give notice to any one. There was therefore no laches on his part, nor was there any ground of complaint that he failed in ordinary prudence, or that he

Laches of indorser of bill of lading.

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did not, in law and equity, complete his security." Plaintiff had the right to rely upon the fact that, as it held the original shipper's bills of lading, and that, in the ordinary course of business, the grain could not be obtained except upon the production and surrender, it would be held for it. If the defendant saw fit to rebill and reship for the Courier Commission Company the grain called for in the bill of lading first issued by it, and sued on in this case, it must now suffer the consequences of its own carelessness.

The direction in the bill of lading to notify the Courier Commission Company at Kansas City in no way can be said to change, modify, or qualify the duty of the railroad company to deliver the grain to shipper's orders. By the contract of affreightment, the duty of the railroad was threefold—first, to forward the grain, second, to notify the Courier Commission Company; in the third place, to deliver to shipper's order on arrival of the grain at its destination. If, after notifying the Courier Commission Company, neither it nor any one came forward with the bills of lading duly indorsed, as provided by the terms thereof, it was the defendant's plain duty to put the grain in store, as provided by statute, as well as by the like emphatic dictates of necessity and business prudence. The duplicate bills of lading issued in this case, and marked as such, cannot be treated as more than written memoranda, demanded by shipper and given by carrier for prudential purposes, in case of the loss of the original.

In view of the present universal use and service of the bill of lading in the business and commercial world, great hardship and wrong would be perpetrated to hold otherwise.

For the reasons herein given, the judgment of the lower court is sustained.

BRACE, C.J., and MACFARLANE and BARCLAY, JJ., concur.

Union Pac. Ry. Co. v. Johnston

Bills of Lading

UNION PACIFIC RAILWAY CO.

v.

JOHNSTON (S. H. D.) *et al.**(Supreme Court of Nebraska, May 2, 1895.)*

Carriers of Merchandise [(1) p. 565]—**Bills of Lading** [(1) p. 608]—**How Far Transfer of Same Operates as Delivery of the Property.**—Bills of lading are symbols of property, and, when properly indorsed, operate as a delivery of the property itself, investing the endorsees with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, to the person entitled to receive the same. *Railroad Co. v. Stern*, 119 Pa. St. 24, 35 Am. & Eng. R. Cas. 551; *Gates v. Railroad Co.*, 42 Neb. 379. (*Page* 604.)

Same—Same—Duty of Carrier as to Delivery of Goods [(1) *post*].—The delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless, when made, the consignee surrenders the bill of lading, either made or indorsed to himself. *Gates v. Railroad Co.*, 42 Neb. 379. (*Page* 605.)

Same—Same—Construction of Bill of Lading in Issue—Questions as to Delivery of Goods Thereon Determined.—A railway company issued to shippers of grain in Nebraska several bills of lading, as follows: "Received of ——— [the name of the shipper] the following described freight, * * * marked and consigned as noted below, * * * to be transported to ———, and delivered at the railway depot on payment of freight charges, together with such charges as have been advanced on the same. Consignee, Brown Bros. Grain Company. Destination, Milwaukee, Wis." The bills of lading contained the following notations: "Care Union Elevator, Council Bluffs, Iowa. Stop at Brown Bros. Elevator Company to clean. Transfer at Council Bluffs." The carrier transported the grain to Council Bluffs, and there delivered it to the consignee named in the bills of lading, without requiring their presentation or surrender. The consignee sold the grain to Bacon & Co., of Milwaukee, and drew on them for its value, with the bills of lading, indorsed to them, attached to the drafts. Bacon & Co. honored the drafts, presented the bills of lading to the carrier, and demanded the grain, and, as it was not delivered, sued the carrier for its value. Part of the grain was delivered by the carrier to the consignee named in the bills of lading before he indorsed and attached them to the drafts drawn on Bacon & Co. (*Page* 602 *et seq.*) **HELD:**

(1) That the bills of lading were through contracts, under and by which the carrier agreed to transport the grain from the places where it received it to Milwaukee, and there deliver it to the party entitled thereto. (*Page* 607.)

(2) That the notations on the bills of lading meant nothing more than

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that the grain should go by way of Council Bluffs, to be cleaned there, or transferred to other carriers, through the instrumentality of the elevator located there. (*Page 607.*)

(3) That the carrier, by the bills of lading, contracted to transport this grain to Milwaukee, and there deliver it to the consignee named in the bills of lading, or, if they had been transferred, to the lawful holders of said bills of lading. (*Page 607.*)

(4) That Bacon & Co., by honoring the drafts drawn against them by the consignee named in the bills of lading, became, and were entitled to have said grain delivered to them at Milwaukee. (*Page 607.*)

(5) That the carrier by delivering the grain to the consignee at a station intermediate the point of shipment and the point of destination, and without the surrender of the bills of lading, was guilty of a misdelivery and conversion of said grain. (*Page 607.*)

(6) That so long as the bills of lading were outstanding they were representations by the carrier to the commercial world that it had in its possession and under its control, and in transit for Milwaukee, the grain for which the bills of lading called. (*Page 607.*)

(7) That the carrier, by delivering the grain, while in transit, to the consignee named in the bills of lading, without their surrender, put it in the power of Brown Bros. Grain Company to defraud third parties by selling the grain, and indorsing the bills of lading, and that the carrier was also liable for the grain on the principle that, where one of two innocent parties must suffer, he who by his conduct has enabled a wrongdoer to perpetrate a wrong must bear the loss, rather than the party without fault. (*Page 607.*)

ERROR to Douglas county district court. *Affirmed.*

J. M. Thurston and W. R. Kelly, for plaintiff in error.

John D. Howe and E. R. Duffie, for defendants in error.

RAGAN, C.—In the months of October and November, 1891, certain persons at certain points in the state of Nebraska, delivered to the Union Pacific Railway

Facts.

Company, (hereinafter called the "Railway Company") for transportation, seven cars of grain. The railway company at the time of such delivery issued and delivered to said shippers bills of lading for the grain received by it. All said bills of lading were substantially as follows: "Received of ——— [the name of the shipper] the following described freight, * * * marked and consigned as noted below, * * * to be transported to ———, and delivered at the railway depot on payment of freight charges, together with such charges as have been advanced on the same." Such bills of lading also contained the following directions and notations: No. 1: "Consignee, Brown Bros. Grain Co. Destination. St. Louis, Mo." Notation: "Care Union Elevator, Council Bluffs, Iowa." No. 2: "Consignee, Brown Bros. Grain Co. Des-

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tion, St. Louis, Mo." Notation: "Care Union Elevator Co., Council Bluffs." No. 3: "Consignee, order Brown Bros. Grain Co. Destination, Milwaukee, Wis." Notation: "Stop at Council Bluffs, Brown Bros. Elevator Co., to clean. Transfer at Council Bluffs." No. 4: "Consignee, order Brown Bros. Grain Co. Destination, Milwaukee, Wis." Notation: "Clean at Council Bluffs, Brown Bros. Elevator Co. Transfer at Council Bluffs." No. 5: "Consignee, order Brown Bros. Grain Co. Destination, St. Louis." Notation: "Care Union Elevator, Council Bluffs, Iowa." No. 6: "Consignee, order Brown Bros. Grain Co. Destination, St. Louis." Notation: "Care Union Elevator, Council Bluffs." No. 7: "Consignee, Brown Bros. Destination, Milwaukee." Notation: "Care Union Elevator, Council Bluffs." The grain consisted of oats, barley, and shelled corn. The parties designated as consignee on the bills of lading are sometimes denominated "Brown Bros.," and sometimes "Brown Bros. Grain Co.," but Brown Bros. Grain Company was the party intended as the consignee on each bill of lading. The notations, "Union Elevator," and "Brown Bros. Elevator, Council Bluffs," had reference to an elevator located in that city, at that time leased and operated by Brown Bros. Grain Company, the consignee of the grain.

It appears from the evidence in the bill of exceptions that at the time these shipments were made there was an elevator located in the city of Council Bluffs, Iowa. This elevator was owned by a corporation known as the Union Elevator Company. A contract existed between the elevator company and some five or six railway companies whose roads entered Council Bluffs that the elevator company, in handling grain which might come into its possession for cleaning or transfer, or both, would not discriminate either in favor of or against either one of the railway companies mentioned. The Union Pacific Railway Company was a party to this agreement.

It further appears that Brown Bros. Grain Company, at the time of the shipments in controversy, was the lessee of this elevator; was in possession of it, and operating it.

Persons shipping grain from points in Nebraska over the Union Pacific Railway Company's road, and which grain was consigned to Milwaukee or St. Louis, or other eastern points, if they desired, could have said grain stopped at Council Bluffs; and cleaned in this elevator; and

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if it was desired by the railway company that the car in which such shipment was made should not go further than Council Bluffs, then the grain would be transferred through this elevator to the cars of the road which was to haul it from there to its place of destination. The railway company did not deliver this grain, or any of it, either at Milwaukee or St. Louis; but it transferred the grain to Council Bluffs, and there made an unconditional delivery of it to Brown Bros. Grain Company, the party named as the consignee in each of the bills of lading, and made such delivery to such consignee without the consignee's surrendering to the carrier the bills of lading issued by it to the shipper. Brown Bros. Grain Company, it appears, sold this grain to E. P. Bacon & Co., made drafts on them for the value of the grain, and attached to such drafts the bills of lading; each bill of lading being indorsed, "Deliver to the order of E. P. Bacon & Company. Brown Bros. Grain Co. By C. T. Brown, Pt.". Bacon & Co., on presentation of the drafts, honored them, and then presented the bills of lading to the railway company, and demanded the grain. In the meantime, Brown Bros. Grain Company had failed, and neither they nor the railway company ever delivered the grain to Bacon & Co. At the time Brown Bros. Grain Company indorsed the bills of lading to Bacon & Co., and attached them to the drafts which they drew on them for the value of the grain, the greater part of the grain had already been delivered to them, only one car of the grain being in transit, or undelivered to Brown Bros. Grain Company, at the time they indorsed said bills of lading, and drew said drafts. Bacon & Co. brought this suit against the railway company, to the district court of Douglass county, for the value of said grain. A jury was waived, and the case was tried to the court, resulting in a finding and judgment in favor of Bacon & Co. And to reverse this judgment the railway company has prosecuted to this court a petition in error.

1. The bills of lading issued by the railway company to the shippers of this grain were through contracts, under and by which the railway company agreed to transport
Bills of lading. this grain from the places where it received it to Milwaukee and St. Louis, and there deliver it to the party entitled thereto. The terms of the bills of lading, fixing the express destination of this grain, and the notations,

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when explained by the evidence, leave no room for doubt whatever that these bills of lading were through contracts. *Angle v. Railroad Co.*, 9 Iowa 487; *Mulligan v. Railroad Co.*, 36 Iowa 181; *Railroad Co. v. Pratt*, 22 Wall. 123; *Beard v. Railway Co.*, 79 Iowa 527, 42 Am. & Eng. R. Cas. 509. The notations on the bills of lading, "Care of the Union Elevator, Council Bluffs"; "Stop at Council Bluffs to clean"; "Transfer at Council Bluffs,"—meant and mean nothing more than that the grain should go by way of Council Bluffs, some of it should be cleaned there, and some of it should be transferred to other lines, or into other cars, at that place, through the instrumentality of said elevator. Doubtless it was a contract on the part of the railway company that it would transport said grain to its place of destination, by way of Council Bluffs; that it would stop some of the grain at the elevator for the purpose of having it cleaned; and that whatever transfer it might be under the necessity of, or desirous of, making to other carriers, in order to complete the transit, should be made at that point. But nothing in these bills of lading, including the notations made thereon in reference to the elevator at Council Bluffs, authorizes or will sustain a construction that by the bills of lading the railway company agreed to transport this freight only to Council Bluffs, or to make delivery of it there.

2. In the case at bar the railway company, the carrier, delivered the freight to the consignee named in the bills of lading, without such bills of lading having been first surrendered to it. We are not necessarily concerned with the question whether a carrier may with impunity deliver goods to the consignee named in the bill of lading, at the place of destination mentioned in such bill of lading, without its surrender, the carrier having no knowledge at the time that such bill of lading has been assigned or transferred. The precise question in this case is whether the railway company, having no knowledge that these bills of lading had been transferred to Bacon & Co., was justified in delivering the grain to the consignee named in the bill of lading, at a point intermediate the place of shipment, and the place of destination. In *Gates v. Railroad Co.*, 42 Neb. 379, it was held that "the bill of lading issued by a carrier to the owner or shipper is the symbol of ownership of the goods shipped, and, though not negotiable, is assignable." See

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also, *Furman v. Railroad Co.*, 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500. In *Railroad Co. v. Stern*, 19 Pa. St. 24, 35 Am. & Eng. R. Cas. 551, it was held that "bills of lading are symbols of property, and, when properly indorsed, operate as a delivery of the property itself, investing the indorsees with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, to the person entitled to receive the same." See also *Hutch. Carr.*, § 129; *Forbes v. Railroad Co.*, 133 Mass. 154, 9 Am. & Eng. R. Cas. 76; *The Thames*, 14 Wall. 98. See also, *Walker v. Railroad Co.*, 49 Mich. 446, 9 Am. & Eng. R. Cas. 251. In this case a creditor of the consignee attempted to get possession of the property by garnishment proceedings against the carrier. The supreme court of Michigan, however, discharged the carrier from liability on the garnishment proceedings, and held that "common carriers must recognize transfers of bills of lading and consignments of goods, and, unless protected by proper vouchers, cannot always assume to deal with consignments as actually and beneficially belonging to the consignee."

3. In *McEntee v. Steamboat Co.*, 45 N. Y. 34, it was held that: "Common carriers deliver property at their peril, and must take care that it is delivered to the right person;

Risks of delivery of goods. for if the delivery be to the wrong person, either by an innocent person, or through fraud of others, they will be responsible, and the wrongful delivery will be treated as a conversion." In *Hutchison on*

Carriers, (§ 130) it is said that: "The carrier takes the risk of a delivery to the person entitled to the goods by the bill of lading and its indorsements. * * * Too great caution cannot, therefore, be exercised in respect to the right of the person to whom the delivery is made. No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person; and the law will allow, in fact, of no excuse for a wrong delivery, except the fault of the shipper himself." See also, *Hutch. Carr.*, §§ 340, 344. In *Railroad Co. v. Stern*, 119 Pa. St. 24, 35 Am. & Eng. R. Cas. 551, it is said that "a railroad company has no right to make a delivery of freight otherwise than in strict accordance with the bill of lading." And in *Gates v. Railroad Co.*, 42 Neb. 379, it was held that "the delivery of goods by a com-

mon carrier to the consignee thereof is made at the peril of the carrier, unless, when made, the consignee surrenders the bill of lading, either made or indorsed to himself." See also *Railroad Co. v. Barkhouse*, 100 Ala. 543; *Weyand v. Railway Co.*, (Iowa) 75 Iowa 573.

In the light of these authorities, we conclude (1) that the railway company, by its bills of lading, contracted to transport this freight to Milwaukee and St. Louis, and there deliver it to the consignee named in the bills of lading, namely, Brown Bros. Grain Company, or, if the bills of lading had been transferred by them, then to the lawful holders of said bills; (2) that Bacon & Co., by honoring the drafts drawn against them, by Brown Bros. Grain Company, with said bills of lading attached thereto and assigned to them, became and were entitled to have said grain delivered to them at Milwaukee and St. Louis; (3) that the railway company, by delivering said grain to the consignees mentioned in said bills of lading, at a station intermediate to the point of shipment and the point of destination, and without the surrender of the bills of lading, was guilty of a misdelivery and conversion of said grain.

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It is suggested in argument here by the counsel for the railway company that it ought not to be held liable to Bacon & Co. for so much of the grain as was delivered to Brown Bros. Grain Company before they indorsed to Bacon & Co. the bills of lading for such grain. This position we think is untenable. In the first place, the railway company, having issued these bills of lading, would be estopped, as against an assignee and holder thereof for value, from saying that it had never had such grain in its possession. *Sioux City & P. R. Co. v. First Nat. Bank*, 10 Neb. 556. And the railway company, having received this grain and undertaken its transportation, by delivering it while in transit to the consignee named in the bill of lading, and without the surrender of such bills of lading at the time, put it in the power of Brown Bros. Grain Company to defraud third parties by selling the grain, and indorsing the bills of lading. And the railway company is also liable for this grain on the familiar principle that where one of two innocent parties must suffer, he who by his conduct has enabled a wrongdoer to perpetrate a wrong must bear the loss, rather than the party without fault. *Walters v. Railroad Co.*, 56 Fed. Rep. 369. It was the duty of the

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railway company, the carrier, before delivering this grain to any person, at any place, to take up the outstanding bills of lading which it had issued for it. So long as the bills of lading were outstanding, they were representations by the railway company to the commercial world that it had in its possession and under its control, and in transit for Milwaukee and St. Louis, the grain for which the bills of lading called.

There is no error in the record, and the judgment of the district court is affirmed.

ABSTRACTS OF RECENT DECISIONS

(1) **Bills of Lading—Character—How Far Conclusive.**—*Explanation or Contradiction by Parol.*—A bill of lading is both a receipt and a contract. In so far as it is a receipt, it may be modified, explained, or contradicted by parol; but in so far as it is a contract, and when free from ambiguity, and in the absence of fraud, concealment, or mistake, it cannot be explained, modified, contradicted, or added to by parol. *Cleveland, C., C. & St. L. R. Co. v. Moline Plow Co.*, (Ind.) 41 N. E. Rep. 480, *citing* *Railway Co. v. Wilson*, 119 Ind. 352.

Same—Same—Same—Right to Show that Consignee is Not Real Party in Interest.—The legal presumption that the consignee named in a bill of lading is the owner of the goods mentioned therein, and the real party in interest, is not conclusive, and if facts are pleaded showing that some other person is the real party in interest, the presumption will not prevail. *Cleveland, C., C. & St. L. R. Co. v. Moline Plow Co.*, (Ind.) 41 N. E. Rep. 480, *citing* *Pennsylvania Co. v. Poor*, 103 Ind. 553.

Same—Validity of Condition as to Computation of Loss and Damages.—A condition in a bill of lading which provides that the amount of loss or damage incurred by a carrier is to be computed at the value of the property at the time and place of shipment, and wholly fails to provide for restitution of the amount which may have been paid by the consignee as freight charges, is unjust, unreasonable and against public policy. *Shea v. Minneapolis, St. P. & Sault Ste. M. R. Co.*, (Minn.) 65 N. W. Rep. 458.

Same—Reasonableness of Stipulation Requiring Claim for Loss within Specified Time.—A stipulation in a bill of lading issued by an express company that "In no event should the defendant be liable for any loss, unless a claim therefor should be made in writing, at the office of the defendant where the money is alleged to have been shipped from, within 32 days from the date of said contract," etc., is unreasonable and inoperative. *Southern Express Co. v. Bank of Tupelo*, (Ala.) 18 So. Rep. 664, *citing* *Express Co. v. Caperton*, 44 Ala. 101.

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Same—Suit against Express Company to Recover Moneys Embezzled by Express Agent—Right to Bills of Lading on Faith of which Moneys were Forwarded.—An agent of an express company, acting in a like capacity for a railroad company, issued a bill of lading of a shipment by fictitious persons, and procured from a bank discount of a draft on the consignee named, delivering to the bank the bill of lading, and thereafter the agent embezzled the proceeds of the draft, which came into his hands as express agent. *Held*, that the bank was entitled to recover from the express company without first surrendering to it the bill of lading. *Southern Express Co. v. Bank of Tupelo, (Ala.)* 18 So. Rep. 664.

Same—Right to Bills of Lading, Given to Secure Drafts after Extinguishment of Drafts as Commercial Paper.—Where by arrangement with a broker to whom goods are consigned a bank takes up drafts on him by the consignor, holds them against him as demand notes, and retains the bills of lading as security, it is the owner of the bills of lading until payment of the notes, and as such is entitled to possession of the goods represented thereby, to the extent of the amounts advanced on the drafts accompanying them. *Walters v. Western & A. R. Co., (U. S. Cir. Ct. App., 5 Cir.)* 66 Fed. Rep. 862.

The opinion of the court in this connection is as follows: "The contention of the appellants, as we understand it, is that as the sight drafts, with bills of lading as collateral, were forwarded to the Atlanta banks for collection, there was no authority in the banks at Atlanta to negotiate the drafts, or make any other use of them than to collect the money, and when the money was collected, no matter from whom, the sight drafts were fully accomplished, and, *ex necessitate*, the bills of lading belonged to Everett & Co. [the consignees]; in other words, that Everett & Co. became the owners and holders of the bills of lading, and entitled to demand from the railroad company the goods represented by such bills just as soon as the sight drafts were paid off, no matter by whose procurement. It may be, and probably is, the law that when the sight drafts were forwarded to the Atlanta banks for collection, and the Capital City Bank advanced the money to pay them, and did pay them, that thereby the sight drafts, as commercial paper, were dead obligations; but we do not think it follows that the bills of lading were thereby accomplished, or that necessarily thereby Everett & Co. became the holders of them, with power of disposal. It rather appears to us that Everett & Co., having the right to pay off the original sight drafts, and thereby become the holders of the bills of lading, had full power to substitute the Capital City Bank to such right. The amended Code of Georgia permits the pledge of goods by the delivery of bills of lading as symbolic of the property pledged. Act Oct. 3, 1887 (Laws Ga. 1887, p. 36). The commercial law, as recognized and declared by the supreme court of the United States, is to the effect that where goods are received by a common carrier for shipment, and a receipt or bill of lading is given therefor, in which it is stipulated that the goods at destination shall be delivered to the order of the consignor, such receipt or bill of lading attached to a draft operates as a pledge of the goods mentioned in the receipt or bill of lading as security for the payment of the draft, and that the carrier cannot, except at its peril, deliver

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the goods represented by such receipt or bill of lading, except upon the production thereof, and the order of the consignor. *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727. To the same purport, see *Boatmen's Sav. Bank v. Western & A. R. Co.*, 81 Ga. 221. We therefore find, upon the facts of this case, that the Capital City Bank, under the contract with Everett & Co., in pursuance of which the bank paid the sight drafts to which the bills of lading in controversy were attached, became the lawful holder of said bills of lading, and, as such, entitled to have and receive from the railroad company the contents represented thereby, at least to the extent of fully paying the sum or sums called for by the sight drafts paid off, and lawful interest thereon.

NOTES

(1) p. 608] **Bills of Lading—Character—How Far Conclusive.**—The *prima facie* nature of a bill of lading, as regards the consignee, is to vest the ownership of the goods consigned by it to him. *The Sally Magee*, 3 Wall. (U. S.) 451; *Grove v. Brien*, 8 How. (U. S.) 429.

The consignee named in a bill of lading is to be deemed *prima facie* the owner of the goods mentioned therein, and upon payment of freight may maintain an action against any person who assumes control over them in violation of his right of control. *Webb v. Winter*, 1 Cal. 417.

But a bill of lading is not conclusive evidence of title in the consignee, and any presumption arising therefrom may be repelled by parol evidence. *Hopper v. Chicago & N. R. Co.*, 27 Wis. 81.

In an action upon a bill of lading the plaintiff must recover, if at all, upon the contract contained in the bill. *Fry v. Louisville, N. O. & C. R. Co.*, 103 Ind. 265, 22 Am. & Eng. R. Cas. 442; *citing Indianapolis, etc., R. Co. v. Remmy*, 13 Ind. 518; *Hall v. Pennsylvania Co.*, 90 Ind. 459, 16 Am. & Eng. R. Cas. 165; *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281, 18 Am. & Eng. R. Cas. 549.

(1) p. 608] **How Far Bills of Lading are Conclusive.**—A bill of lading is *prima facie* evidence of the matters contained in it, but is subject to explanation, and a carrier may show any injury, loss, fraud, or deceit occasioned or practiced by any previous carrier, or by the shipper of the goods. *Great Western R. Co. v. McDonald*, 18 Ill. 172.

A bill of lading in the usual form is a receipt for the quantity of goods shipped, and also a promise to transport and deliver the same. So far as such a bill is a receipt it may, in an action between the parties to it, be controlled by parol proof. *O'Brien v. Gilchrist*, 34 Me. 554; *Cafiero v. Welsh*, 8 Phila. (Pa.) 130.

A bill of lading in its character is two fold, viz.: a receipt and a contract to carry and deliver goods. So far as it acknowledges the receipt of goods and states their condition, etc., it may be contradicted, but in other respects it is treated like other written contracts. *Wayland v. Mosley*, 5 Ala. 430; *May v. Babcock*, 4 Ohio 334; *Walfe v. Myers*, 3 Sandf. (N. Y.) 7.

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But this principle does not apply to parol testimony, which shows that it is the contract of other persons than those in whose names it is executed. *McIntyre v. Steele*, 26 Ala. 487.

Parol evidence is admissible to show fraud or mistake in making a bill of lading. *Steamboat "Wisconsin" v. Young*, 3 Green (Iowa) 268; *citing Steamboat "Missouri" v. Webb*, 9 Mo. 193.

By the rules of common law a bill of lading is regarded as the symbol of the property therein described; and in case the shipper reserves to himself the *jus disponendi*, he can transfer the title at any time before the property is delivered by the carrier to the consignee as effectually by the delivery of the bill of lading as by the delivery of the property itself. *Emery v. Irving Nat. Bank*, 25 Ohio St. 360.

A bill of lading is not, according to the great weight of authority, conclusive upon the carrier; accordingly when such a bill is issued by a station or shipping agent of a railroad company without receiving the goods named in it for transportation, such bill imposes no liability upon the carrier even to an innocent consignee or indorsee for value, and the carrier is not estopped by the statements in the bill from showing that no goods were in fact received for transportation under the bill. *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224.

In this case the court pointed out the fact that there is an unbroken line of authorities in England that, even as against a *bona fide* consignee or endorsee for value, a carrier is not estopped by the statements of a bill of lading issued by his agent, from showing that no goods were in fact received for transportation. *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 C. B. 104; *Hubbersty v. Ward*, 8 Exch. 330; *Brown v. Powell D. S. Coal Co. L. R.*, 10 C. P. 562; *McLean v. Fleming L. R.*, 2 Scot. App. Cas. 128; *Cox v. Bruce, L. R.* 18 Q. B. Div. 147; *Meyer v. Dresser*, 15 C. B. N. S. 646; *Jessel v. Bath, L. R.* 2 Exch. 267, and showed that this has not been at all changed by the "Bills of Lading Act" (18 & 19 Vict. chap. 111 § 3).

It is also the settled doctrine of the federal courts. *Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182; *The Lady Franklin*, 8 Wall. (U. S.) 325; *Pollard v. Vinton*, 105 U. S. 7; *St. Louis I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 30 Am. & Eng. R. Cas. 88; *Friedlander v. Texas & P. R. Co.*, 130 U. S. 416, 40 Am. & Eng. R. Cas. 70. See also *Sears v. Wingate*, 3 Allen (Mass.) 103; *Baltimore & O. R. Co. v. Wilkins*, 44 Md. 11; *Fellows v. The R. W. Powell*, 16 La. Ann. 316; *Hunt v. Missouri Cent. R. Co.*, 29 La. Ann. 446; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 380; *Williams v. Wilmington & W. R. Co.*, 93 N. Car. 42; *Dean v. King*, 22 Ohio St. 118.

The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods is it susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transporta-

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tion ; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received ; that this real and apparent authority, i.e. the power with which his principal has clothed him in the character in which he is held out to the world, is the same, viz., to give bills of lading for goods received for transportation, and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively or merely by mistake.

The only states found in which a contrary rule has been adopted are New York, Kansas, Nebraska, apparently Illinois, and perhaps Pennsylvania. *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111 ; *Batavia Bank v. New York, L. E. & W. R. Co.*, 106 N. Y. 195, 32 Am. & Eng. R. Cas. 497 ; *Sioux City & P. R. Co. v. First Nat. Bank of Fremont*, 10 Neb. 556, 1 Am. & Eng. R. Cas. 278 ; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293, 6 Am. & Eng. R. Cas. 436 ; *Brooke v. New York, L. E. & W. R. Co.*, 108 Pa. 529, 21 Am. & Eng. R. Cas. 64.

A bill of lading signed by the agent of a carrier, but the goods upon which have not been received for shipment does not bind the carrier. Such act of the agent is outside of the scope of his authority, and the owner of the line of transportation is not responsible for this act of his agent, although it is done under an appearance of conformity to his authority. *Baltimore & O. Ry. Co. v. Wilkins*, 44 Md. 11 ; *Grant v. Norway*, 2 Eng. L. & Eq. 337 ; *Hubbersty v. Ward*, 8 Exch. 330 ; *Sears v. Qingate*, 3 Allen (Mass.) 103 ; *Schooner Freeman v. Birmingham*, 18 How. (U. S.) 191 ; *The Loon*, 7 Blatchf. (U. S.) 244 ; *Fellows v. Steamer Powell*, 16 La. Ann. 311 ; *Second Nat. Bank of Toledo v. Walbridge*, 19 Ohio St. 425 ; *Dean v. King*, 22 Ohio St. 118 ; *Louisiana Bank of New Orleans v. Laveille*, 52 Mo. 380.

(1) p. 609] **Negotiable Quality of Bills of Lading.**—The meaning, character, and effect of a bill of lading, as concerns its negotiable quality, was stated by the supreme court of the United States in *Pollard v. Winton*, 105 U. S. 7, in the following language : “ A bill of lading is an instrument well known in commercial transaction, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without endorsement, and it is efficacious for its ordinary purposes in the hands of the holder;

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it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense.

It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received there can be no valid contract to carry or deliver."

See also *Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182; *Baltimore & Ohio R. Co. v. Wilkins*, 44 Md. 11; *Miller v. Hannibal & St. Joseph R. Co.*, 99 N. Y. 430, 12 Am. & Eng. R. Cas. 30.

Bills of lading are not negotiable in the same sense in which are bills of exchange or promissory notes. They stand in the place of the goods they represent, and delivery by endorsement of them transfers the right of property in the goods, but not in the contract itself, so as to enable the endorsee to maintain, at the common law, an action for it in its own name. *Baltimore & Ohio R. Co. v. Wilkins*, 44 Md. 11; *Thompson v. Dominie*, 14 Mees. & Wells, 403; *Gurney v. Belirend*, 25 Eng. Law & Eq. 136; *Blanchard v. Page*, 8 Gray (Mass.) 296.

Although a statute makes bills of lading negotiable by endorsement and delivery, it does not follow that all the consequences incident to the endorsement of bills and notes before maturity ensue, or are intended to result from such negotiations. The rule that a *bona fide* purchaser of a lost or stolen bill or note, endorsed in blank and payable to bearer, is not bound to look beyond the instrument, has no application to the case of a lost or stolen bill of lading. *Shaw v. R. Co.*, 101 U. S. 557; *citing Goodman v. Harvey*, 4 Ad. & El. 870; *Goodman v. Symonds*, 20 How. (U. S.) 343; *Murray v. Landner*, 2 Wall. (U. S.) 110; *Mathews v. Poythress*, 4 Ga. 287.

On this point the court, in *Shaw v. Railroad Co.*, *supra*, uses the following language: "The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it,—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why then should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true

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owner, by his negligence or carelessness, may have put it into the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. * * * Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills or notes. Some of these consequences would be very strange, if not impossible. Such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it."

TAYLOR (Alden C.)

v.

MAINE CENTRAL RAILROAD CO.

(*Supreme Judicial Court of Maine, March 15, 1895.*)

Carriers of Merchandise—Right to Contract for Liability on Connecting Lines [(1) p. 644].—A railroad company, as a common carrier, may contract to carry goods beyond, as well as within, the limits of its own line of road. (*Page 615.*)

Same—Express Contract Essential to Establish a Liability for Damages Inflicted by Connecting Lines [(1) p. 644].—**Evidence of Contract.**—Where it is sought to extend the liability of a common carrier beyond its own line, the burden is upon the party seeking to establish such liability to show an express contract by which the company becomes liable, as com-

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mon carrier, beyond its own route, and such contract must be shown by real and satisfactory evidence. (*Page 616.*)

Same—Carrier—When Liable as Forwarder.—The fact that a railroad company connects with other independent roads, and receives goods for transportation beyond the termination of its own line, will render it liable as a forwarder by the connecting line, but in the absence of any special contract it will not be liable as a common carrier beyond the termination of its own line. (*Page 616.*)

Same—Receipt of Freight Charges as Establishing a Liability for Damages Inflicted by Connecting Lines [(2) p. 650].—The mere receipt by a railroad company of freight charges over its own line and also over lines of connecting but independent roads to the place of destination of the goods shipped will not establish a through contract which renders the company liable as a common carrier beyond its own route. (*Page 617.*)

REPORT from Kennebec county superior court. *Plaintiffs nonsuited.*

S. S. Brown, for plaintiffs.

Edmund F. Webb and Appleton Webb, for defendant.

FOSTER, J.—In December, 1892, the plaintiffs at Oakland shipped four car-loads of apples, on four different days, consigned to parties in Cincinnati, Ohio. This action was brought to recover damages against the de- Case stated. fendant, as common carrier, occasioned by the apples freezing while in the course of their transportation from Oakland to Cincinnati.

The plaintiffs base their claim on the ground that the defendant contracted to transport the apples from the place of shipment to Cincinnati. The defendant, however, claims that, while the apples were to be carried Facts. to Cincinnati, the contract was to carry them only over its own route to Portland, and there deliver them to the Boston & Maine Railroad, and that, having done that safely and in the usual time, their responsibility then and there terminated.

The defendant was an insurer over its own route. But it is agreed that the freezing did not occur on the defendant's line of road, but on some of the connecting lines.

Undoubtedly, a railway company may contract to carry goods beyond as well as within the limits of its own line of road. *Perkins v. Railroad Co.*, 47 Me. 553. But where the liability of the company is sought to be extended beyond its own line, the burden is upon the party seeking to establish such liability to show that there was an express contract by which the company became liable as common carrier beyond the Connecting lines—Liability of forwarding carrier.

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limits of its own route. Otherwise the common carrier is liable as such only over the extent of its own route, and for safe storage and delivery to the next carrier. There being other independent connecting lines, each road is bound only, in the absence of any special contract, to carry safely over its own route, and safely deliver to the next connecting carrier. In the absence of a special contract to that effect, no such liability will attach. Nor will such agreement or contract be inferred from loose language, or where the meaning of the contract is doubtful or uncertain, but only from clear and satisfactory evidence. *Myrick v. Railroad Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; *Burroughs v. Railroad Co.*, 100 Mass. 26.

In the case of *Myrick v. Railroad Co.*, *supra*, the principle of law applicable in the conveyance of goods by successive carriers, over connecting but independent lines of transportation, has been so clearly stated that it may well be repeated in this connection. The court say: "If the road of the company connects with other roads, and the goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line, the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it.

The plaintiffs seek to hold the defendant as a common carrier beyond the terminus of its line, by virtue of the receipts or waybills given by the defendant to the plaintiffs at the time of the shipment. These receipts contain charges for transportation from Oakland to Portland, and from Portland to Cincinnati. These charges are entered separately. Do these papers prove an express contract or undertaking on the part of the defendant to carry the property from Oakland to Cincinnati? That is the contention of the plaintiffs. The defendant claims otherwise.

We think these receipts do not constitute a special contract rendering the defendant liable as common carrier of the goods beyond the limits of its own route. They are mere receipts in common use by all railroads. They contain no element of

Receipts and
waybills as
creating lia-
bility beyond
own line.

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contract whatever, and impose upon the defendant no further obligation than the law itself imposed without them. There is no element in them rendering the defendant specially liable further than it would have been if no such receipts had been given. *Myrick v. Railroad Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; *Nutting v. Railroad*, 1 Gray 502. They are an acknowledgment by the defendant that it had received the apples, and pay for transportation to the end of its own line, and also from there to Cincinnati. The defendant's line was but one link in the chain of successive carriers over connecting but independent roads. The apples being "perishable" property, the rule of the company required the station agent to collect the freight from Portland to Cincinnati in advance. This fact, of itself, does not establish a through contract, whereby the defendant would be liable as common carrier beyond its own route. *Myrick v. Railroad Co.*, *supra*; *Washburn & Moen Manuf'g Co. v. Providence & W. R. Co.*, 113 Mass. 490.

In the case last cited, the goods were delivered to the defendant at Worcester, for transportation to New York, the defendant, at the time of shipment, receiving pay for the transportation for the entire distance, which covered connecting but independent lines. In an action to recover damages against the railroad company, it was held that it was not liable as a common carrier beyond the end of its road; and the court say: "If the entire freight money were paid in advance, yet, in the absence of any contract by the first carrier to be responsible for the entire distance, he would be considered as receiving it in part for his own share of the service, and as agent for the next carrier in the series for the residue."

With this view of the case, it becomes unnecessary to consider the further ground of defense set up, and concerning which the evidence is more or less conflicting, viz., that at the time of delivery and shipment there was a special contract, in the form of what is denominated a "release," executed by the defendant, and accepted by the plaintiffs, in which it was expressly provided that the defendant was to be bound as common carrier only over its own line, and that it was not to be held liable for any damages arising to the property after the same should have left its possession.

In accordance with the stipulation in the report of this case, the entry must be,

Plaintiffs nonsuit.

AMERICAN NATIONAL BANK

v.

GEORGIA RAILROAD CO.

(Supreme Court of Georgia, August 16, 1895.)

Carriers of Merchandise—Connecting Lines [(1) p. 644]—**Payment of Freight.**—Where goods were shipped upon a through contract of shipment over the lines of several connecting railway companies, and the last of these companies accepted the goods from the next preceding carrier with notice that the initial carrier had issued to the consignor a through bill of lading, reciting that the entire freight charges had been prepaid, although the notice was also to the effect that this recital was erroneous, yet where, under these circumstances, such last connecting carrier paid the freight charges which had accrued up to the time it took charge of the consignment, it did so at its own risk, relatively to the rights of an innocent person who had taken from the consignor the bill of lading duly indorsed, in the belief that the freight had been actually prepaid, and, upon the faith of such belief, had accepted as cash a draft drawn by the consignor upon the consignee, to which draft the bill of lading was attached, as was usual in the course of such transactions. *(Page 620.)*

Same—Indorsement of Bill of Lading—Bona Fide Holder.—Under the facts recited enough information was brought to the knowledge of the last carrier to put it upon inquiry as to the fact of prepayment, and as to the then ownership of the bill of lading; and if it failed to take the proper steps to ascertain the real facts, and protect itself accordingly, it cannot thereafter set up a refusal by the innocent holder of the bill of lading to pay the freight it had earned, and the freight charges it had advanced, as a defense to an action of trover by such holder for the goods consigned. And this is true, whether the freight charges upon the consignment had actually been prepaid or not. *(Page 621.)*

ERROR from city court of Richmond. *Reversed.*

J. R. Lamar, for plaintiff in error.

Jos. B. & Bryan Cumming, for defendant in error.

SIMMONS, C.J.—Nathan, a grain merchant, shipped from Kansas City, Mo., two car-loads of grain to Wallace & Co. of Augusta, Ga., over the Missouri Pacific Railway, taking a through bill of lading to Augusta, signed by the proper officer of the Missouri Pacific Railway Company. Nathan gave his check upon a bank for the amount of the freight, the check was accepted as cash by the agent of

Facts.

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the railway company, and the bill of lading was marked by the agent " Freight prepaid." Nathan took the bill of lading, drew a draft on Wallace & Co., the consignees, attached the bill of lading to the draft, and negotiated it to the American National Bank of Kansas City, the bank taking it for actual credit in the usual course of business. The waybills and manifest issued by the Missouri Pacific Railway Company for the grain contained the entry: " Delivering line will please collect all freight charges. Through error, bill of lading has been issued reading prepaid. This bill of lading must not be protected."

When the grain arrived in Atlanta, it was delivered to the Georgia Railroad Company, which received the waybills with these indorsements upon them. The Georgia Railroad Company paid the freight from Kansas City to Atlanta and carried the grain over its line to Augusta, and upon the arrival of the grain at Augusta demanded the freight it had paid to the other companies, which had transported the goods from Kansas City to Atlanta, and the freight which it had earned upon its own road. This demand was refused. The goods were demanded of the Georgia Railroad Company by the agent of the American National Bank, the demand was refused, and the bank thereupon brought its action of trover against the railroad company to recover the grain. The judge to whom the case was submitted, without the intervention of a jury, decided that the plaintiff could not recover.

If the case were between the American National Bank and the Missouri Pacific Railway Company, it would, under many decisions, be free from difficulty. The law seems to be that, where an agent has authority to issue bills of lading, and does issue one with certain representations contained therein, and the bill of lading is negotiated to an innocent third person, the railroad company, as between itself and such third person, is estopped to deny the representations made in the bill of lading. Under these decisions, it is immaterial that the bill of lading is not negotiable in the strict sense of the term. A representation in a non-negotiable chose in action, when acted upon, is, according to the usual rule applied in cases of estoppel, held to be equivalent in all respects to one made in the case of a negotiable paper. Some of the decisions referred to are also put upon the ground that, where one of two inno-

Agent's authority to issue bills of lading—Binding effect.

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cent parties must suffer from the wrongful act of a third party, the law casts the burden of loss upon him by whose act, omission, or negligence such third party was enabled to commit the wrong which occasioned the loss. The superior equity is with the *bona fide* assignee who has parted with his money upon the faith of the recitals contained in the bill of lading. 2 Am. & Eng. Enc. Law, "Bill of lading," p. 227, and cases cited; Bank of Batavia v. New York, L. E. & W. R. Co., 106 N. Y. 195; Howard v. Tucker, 1 Barn. & Adol. 713; Armor v. Railroad Co., 65 N. Y. 114; Railroad Co. v. Larned, 103 Ill. 293; Brooke v. Railroad Co., 108 Pa. St. 429; Wichita Sav. Bank v. Atchison, T. & S. F. R. Co., 20 Kan. 519; Sioux City & P. R. Co. v. First Nat. Bank, 10 Neb. 556; Coventry v. Railway Co., 11 Q. B. Div. 776; Abb. Shipp. (13 London Ed.) p. 565, and cases cited.

A very large proportion of the business of the country is founded upon transfers of bills of lading; and if the transferee

Conclusive-
ness of bill of
lading.

were required, at his peril, to ascertain from the carrier whether the representations made in the bill of lading are true or not, it would practically put an end to this class of transactions. The better and safer rule is to hold that the carrier who issues the bill of lading is bound by the representations of his agents.

Mr. Justice MILLER, in discussing this subject in the case of McNeil v. Hill, Woolw. 96, Fed. Cas. No. 8914, says: "As civilization has advanced and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter and otherwise which prevail while society is in its earlier and simpler stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent, invention of like character, for the transfer, without the cumbersome and often impossible operations of actual delivery of articles of personal property, is the indorsement or assignment of bills of lading and warehouse receipts. Instruments of this kind are *sui generis*. From long use and trade they have come to have, among commercial men, a well-understood meaning, and the indorsement and assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale. * * * If the warehouseman gives to the party who holds such receipt a false credit, he will not be suffered to contradict his statement which he has made in

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the receipt, so as to injure a party who has been misled by it."

HORTON, C.J., in the case of *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.*, *supra*, says: "Where one advances money on a bill of lading, or buys property therein set forth, by taking a transfer of such instrument absolutely, the only evidence which he has of the quantity of goods which he has bought or advanced money on may be the statement contained in the bill of lading. Indeed, one of the main uses of bills of lading of grain, at this day, is to afford shippers opportunity to obtain advances upon their shipments. When issued, the parties issuing them have the knowledge that they may and probably will be used with commission merchants, or at some bank, to obtain advances of money. In the most of cases this result is almost certain to follow."

Under the facts of the present case, we think what has been said as to the liability of the initial carrier upon the representations contained in the bill of lading applies also as between the Georgia Railroad Company and the assignee of the bill of lading. When the Georgia Railroad Company received the shipment at Atlanta, and paid the freight charges which had accrued up to that time, it did so with notice that the initial carrier had issued to the consignor a through bill of lading reciting that the entire freight charges had been prepaid; and its agents ought to have known that, in all probability the bill of lading had passed into the hands of third parties, who had acted upon the faith of this representation. Having such notice as was sufficient to put it on inquiry, it ought to have ascertained, before it paid the charges and accepted the shipment, whether the bill of lading had been negotiated or not; and, having failed to make any inquiry, we do not think it can hold the goods, either for its own charges or those paid by it, as against an innocent purchaser under the bill of lading. Its acceptance of the shipment upon this bill of lading was an adoption of the bill of lading as issued, and it became responsible to innocent third parties for such statements as were contained in that instrument, just as if it had issued the same in the first instance.

Connecting lines—Duty of final carrier with knowledge that bill of lading is erroneously marked.

Judgment reversed.

LUMPKIN, J., not presiding.

PAGE (Paul E.)

v.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY CO.

(Supreme Court of South Dakota, Aug. 3, 1895.)

Carriers of Merchandise—Limitation of Liability to Own Lines [(1) p. 677]—In the absence of a special contract the liability of a common carrier accepting freight for a place beyond its usual route ceases when such freight is properly delivered to a competent carrier carrying to the place of address or connected with those who thus carry. (Comp. Laws Minn. § 3905.) (Page 623.)

Same—Authority of Station Agent to Bind Carrier by Through Contract [(2) *ante*].—A local station agent of a railroad company, as such, has no power, without further authorization, express or implied, to bind his company by a contract to transport freight beyond its line. (Pages 623, 624.)

Same—Carrier may Contract for Transportation Beyond Own Line [(1a) p. 649]—**Liability Thereon.**—It is, however, entirely competent for a railroad company, as a common carrier, to contract to carry freight beyond its own line, and if it does so undertake, such contract is binding upon it. (Page 623.)

Same—Same—Contract for Through Shipment Shown by Facts and Circumstances.—Such contract may be shown, not only by express stipulation of the authorized agent of the carrier, but by facts and circumstances created by itself, indicating that it was thus to carry through. (Page 626.)

Same—Same—What Circumstances Sufficiently Show Through Contract.—An agreement upon, and payment of, one entire and solid compensation to the place of destination, and the sending by the carrier of a car of the connecting line over which such freight was to pass, upon and after an agreement with the local agent that the shipper was to have a through car so that the freight should not be subject to be unloaded or handled in transit, are circumstances sufficiently tending to show a through contract to entitle such evidence to go to the jury upon the question of whether or not the carrier made or recognized such a contract. (Page 627.)

APPEAL from Davison county circuit court. *Affirmed.*

H. H. Keith and *D. A. Mizener*, for appellant.

Preston & Hannett, for respondent.

KELLAM, J.—This is an action to recover for damages to a car-load of pop-corn shipped by respondent from Mitchell, S. D., over appellant's road. The corn was consigned to a party in Boston, and it is practically undisputed that it was damaged in transit, but after it left appellant's line of road. It is evident that the rights of

Case stated.

respondent and the liabilities of appellant must depend upon the contract under which the corn was shipped.

If appellant made a through contract, by which it undertook to transport the corn through from Mitchell to Boston, then it may be liable; but unless it did by contract undertake to do more than to carry it safely over its own line, then it would not be liable for the injuries occurring on other lines after its own duties had been discharged by properly delivering it in good condition to such connecting line. This is statute law. Comp. Laws, § 3905. At the conclusion of the evidence the court refused to direct a verdict for the defendant, and, under instructions excepted to by defendant, submitted the questions in issue to the jury, who found for the plaintiff. From the judgment entered thereon the defendant appeals.

Statutory
limit of lia-
bility.

While, as already stated, the duty of appellant company, in the absence of a different contract, was fully performed when it safely carried the corn to the terminus of its own line and delivered it in good condition to the connecting line, yet it was entirely competent for it to make a contract to carry it through to Boston, and if it did so undertake, such contract would be binding upon it. Railroad Co. v. Pratt, 22 Wall. 132; Hill Manuf'g Co. v. Boston & L. R. Corp., 104 Mass. 122; Quimby v. Vanderbilt, 17 N. Y. 306; Condict v. Railway Co., 54 N. Y. 500.

Contract lia-
bility beyond
terminus.

It is probably equally well settled that a local station agent, as such, has no power, without further authorization, express or implied, to bind his company by a contract to transport freight beyond its line. Grover & Baker Sewing Mach. Co. v. Missouri Pac. Ry. Co., 70 Mo. 672; Railroad Co. v. Pratt, *supra*; Burroughs v. Railroad Co., 100 Mass. 26; Wait v. Railroad Co., 5 Lans. 475.

Station agent's
power to con-
tract beyond
lines.

Neither of these propositions is disputed by either party, but the claim of appellant is that there was no evidence in the case so tending to show an enlargement of the authority or power of the station agent, or a recognition by the company of the contract claimed to have been made as to justify the submission to the jury of the question of his authority to bind the company by the contract which respondent claims he undertook to make.

Contract lia-
bility beyond
terminus.

Assuming for the moment that the agent had authority to make a through contract, we think the question of whether he did so or not is settled affirmatively by the verdict of the jury, for they were distinctly charged by the court to find from the evidence what was the intention and understanding of the parties, as to whether the understanding was to carry the corn through to Boston and in a through car, without transshipment, or simply to carry it to the end of appellant's road and deliver it to a connecting line, and that, unless they found affirmatively on the first proposition, they could not find a verdict for the plaintiff.

We conclude, therefore, that the open question in the case is this: Did the trial court err in submitting to the jury, **Station agent's authority to bind carrier by through contract.** against defendant's objections, the question of the station agent's authority to make and bind his company by a through contract? The settlement of this question will require an examination of the evidence. While the testimony of the station agent and the plaintiff may be in some respects discrepant, the question must be considered from the standpoint of the plaintiff's evidence, for the jury was entitled to accept his version of what was said and done as correct, and so the question before the trial court was, Would the plaintiff's evidence, if accepted by the jury, sustain a verdict in his favor?

The plaintiff after testifying that he had a lot of pop-corn which he desired to ship, and that Mr. Obeland, appellant's station agent at Mitchell, solicited the consignment, proceeded

Same-Evidence examined. as follows: " Mr. Obeland said that he understood that I had a car of corn to ship to Boston and that he would like me to consign that corn over his road.

* * * I told him that if he would give me as good or better rate than the Milwaukee road would do, that I would consign over his line of road. He said he could not give me a rate, a cut rate, but he would write for instructions and see what he could do. I next saw him a week or ten days afterwards. He then said he had a rate,—that he had got instructions, and had received a rate. That is all he said at that time. I then said I would ship over his road. That is all I said at that time. I next had a conversation with him in reference to the shipment of this freight, probably a week later at my place. He came out and asked me when I would be ready to ship, and when to order a car. I told him I would ship, and there

was a conversation about a through car, and I made an agreement with him then for a new car and through car, and a car that was not to be transferred,—no transferring of the goods,—through to Boston without a transfer. He said that he had received a rate, a lower rate than the Milwaukee was giving at that time. He stated the rate was 62½ cents. * * * I insisted on a car that must be a through car, without any transfer of the goods. The freight was to be payable at Boston. I said that I would ship the corn if I could get the rate, a through car, and a car that would not be transferred. He said that was the kind of a rate and the kind of a car that he would give me. Q. To whom did you instruct Mr. Obeland, if at all, to ship that corn to Boston? A. It was billed to James Spear. Q. What did he say in reference to the shipping of it to Mr. Spear? A. He said he would bill it through to Mr. Spear.” By the testimony of station agent Obeland, it appeared that the car furnished for the shipment of this corn was not one of appellant’s cars, but a new car of the Soo line, which connected with appellant’s line at Minneapolis, that he did not order a Soo car, and that he did not know who did. He further says: “ I know how it came that the Soo car was sent here for that shipment. I ordered a car that I could load pop-corn in to be consigned to Boston, and they gave me a foreign car because we could not load any of our own cars off our own line. This car being sent care of Soo line, they gave me a Soo car. I suppose that is the reason.”

It is very evident that no specific authorization of the agent Obeland is shown to make a through contract or a contract binding appellant company to carry this freight beyond the limits of its own road, but authority to contract and the contract may be inferred from facts and circumstances whose existence, if found to exist, could hardly be accounted for except upon the theory that the parties had mutually and authoritatively agreed upon what should be done. Accepting Page’s testimony as correct—and, as before remarked, in the settlement of the immediate question now before us we must assume that the jury would have so accepted it—there could be little doubt that, when the corn was accepted for shipment, both he and the agent understood that the understanding of the company was to take it through to Boston in the Soo car, into which it was loaded at Mitchell. If the agent did not so understand it, and Page’s

Same—Evidence examined, continued.

Connecting Lines Page v. C., St. P., M. & O. Ry. Co.

testimony is true, he was dealing fraudulently with Page, for by such testimony the exact condition under which the shipment was made by Page and received by the agent was that it was to be a through shipment in a car without a transfer.

It is true the testimony does not very directly or satisfactorily connect the general freight agent or the other general officers of the company with such understanding between Page and the station agent, but we are inclined to think that, while the agent's authority could not be safely found from any one particular and isolated fact found, yet all the facts, with the inferences properly deducible therefrom, were sufficient to justify the court in submitting the question to the jury as one of fact, whether the company had so empowered the agent, or had recognized the contract claimed to have been made with him as binding upon it.

First, a through price was given and agreed upon which was to be the one and entire compensation for carrying through. In *Railroad Co. v. Pratt*, 22 Wall. 132, the court, in speaking of the significance of such fact, says: "Again a specific price was agreed upon for the transportation over the whole route. This was in accordance with the practice, and whether paid at Potsdam or at Boston was unimportant. * * * The jury were justified in inferring that, where a carrier fixes a price for the transportation over the whole route, he makes the entire contract his own. One who carries simply over his own line, and thence forward by other lines, would ordinarily, the jury may say, make or collect his own charges, and leave the remaining charges to be collected by those performing the remaining service. Receipt of the entire pay affords a fair presumption of an entire contract.' In *Root v. Railroad Co.*, 45 N. Y. 532, the court, referring to the manner in which a through contract may be shown, said: "Such an undertaking may be established by express contract, or by showing that the company held itself out as a carrier for the entire distance, or received freight for the entire distance, or other circumstances indicating that it was to carry through." In *Railroad Co. v. Copeland*, 24 Ill 332, where the question was as to the liability of the receiving company for the loss of baggage beyond its own line, where the owner had paid through fare to such first company, the court thus tersely put the undertak-

Same—Agent's
authority
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ing of such company with the passenger: "You pay through, and you and your baggage shall be carried through." This view of the effect of a through payment was declared in *Candee v. Railroad Co.*, 21 Wis. 587, to be a "safe, sound, and reasonable rule." In each of the following cases, the fixing and receipt of one entire compensation for the through route is spoken of as a circumstance, in connection with others, tending to show a through contract, or such a "connection in business" between the several lines as to make the first carrier liable for the whole route. *Weed v. Railroad Co.*, 19 Wend. 534; *Hart v. Railroad Co.*, 8 N. Y. 37; *Wilcox v. Parmelee*, 3 Sandf. 610; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339; *Chouteaux v. Leech*, 18 Pa. St. 232; *Steamboat Co. v. Brown*, 54 Pa. St. 82. In 2 Pars. Cont. p. 212, the learned author, in speaking of what would tend to show a contract to carry through, says: "And his receipt of payment for the whole route would be evidence going far to prove such undertaking."

We should be unwilling to hold that the payment and receipt of one entire compensation was sufficient of itself to establish a through contract, but we do think it reasonable, and justified by well-considered authorities, to hold that it is of itself a fact to be considered, in connection with other circumstances, if any are shown, as going to show the intent and understanding, and therefore the contract, of the parties. It further appears that the car furnished for this shipment was not one of its own, but one of an eastern line. The agent says he did not order such a car. Presumably, then, it was sent by the company. The agent accounted for this car being sent on the ground that appellant company did not send its own cars off its own line of road, but this would not explain if the company contemplated a transfer of this freight at Minneapolis, the end of its line. We do not regard the fact at all controlling, and, considered alone, would probably not be very important, but it is right in line with plaintiff's claim that the company was to take the corn through without transshipment, and, unexplained, was another circumstance from which, with others, the jury might infer an agreement so to do.

Through payment not enough to fix liability.

The company did just what it seems to us it would have done if it fully understood that the corn was to be taken

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through without reloading. It sent, not one of its own cars, but one of a connecting line, over which the freight was to be transferred after it left the defendant's road. This circumstance, which the company itself created, would certainly confirm Page in the understanding that he had made a valid contract with the agent for a through car, and that the company was recognizing and carrying it out. As was said in *Hill Manuf'g Co. v. Boston & L. R. Corp.*, 104 Mass. 135: "Such being their position, they offer to receive goods to be carried to New York. They receive them to be delivered there. They give a waybill for the entire distance. They take pay for the transportation over the whole of the line. The whole course of proceedings is exactly what it would be if they meant to contract for the whole distance, and to all appearances, as between them and the owner, the freight money is one indivisible item. We think these circumstances justify the inference that they assume the liability for the entire transit, relying upon a third party for indemnity against all risks occurring beyond their own limits."

In the above case the freight was billed through. In the case at bar, the appellant attaches much importance to the fact that this corn was billed only to Minneapolis, but the billing was the act of the station agent. If he billed it through to Boston, as Page swears he said he would, the company would doubtless have claimed, as now, that he had no authority to, and did not bind it by so doing. It nowhere appears that Page knew that it was not billed through, as he testifies it was to be, but was only billed to Minneapolis. The fact that it was so billed without Page's knowledge is only important as tending to show the agent's understanding of the contract. It is not controlling.

Suppose a shipper applies to the station agent at Pierre, on the Northwestern Railway, for a rate and a through car to Mitchell, on the Milwaukee road. The agent informs him that he will get him a rate from his superior officers. He afterwards gives him the rate so received. The shipper accepts the terms, and the company, from its headquarters, sends him a Milwaukee car, which he accepts and loads. Can it be fairly said that there is nothing in such facts, unexplained, tending to show a knowledge and an understanding

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on the part of the company that he was to have a through car? It would not prove such contract, and its probative force might be weak, but it would not be immaterial, certainly, when considered in connection with other circumstances, such as the payment of one entire compensation to the point of destination. Through shipments of freight under one entire contract with the receiving carrier, over its own and connecting lines, are not infrequent or extraordinary transactions, and while the carrier, like any other party, is only liable upon such contract as it has made, the making of the contract may be inferred from its conduct and attending circumstances which it creates. It would be wrong and intolerable to hold that such contract could only be shown by evidence of an express and formulated agreement by the manager or general freight officers of such carrier.

In this case the facts and circumstances, as testified to by Page, in our opinion tended to show an understanding by the company that it was to take the corn through to Boston without change of cars. As against the evidence of the station agent, it might not have satisfied us that such was the company's understanding; but it was a question of fact, and, under under an instruction which we think stated the law correctly and with fairness to both sides, the jury found the fact in favor of the plaintiff. The other assignments of error are generally subordinate to, and controlled by, the views we have here expressed upon the main question.

We have examined them all, and see no good reason for disturbing the judgment of the trial court, and the same is affirmed.

CORSON, P.J., concurs.

FULLER, J. (dissenting).—I cannot concur. There was no evidence before the jury tending to establish a through contract, entered into between plaintiff and some one authorized to bind the defendant company. The general freight agent was not requested to authorize the proposed agreement, nor did he even quote a through rate to his agent at Mitchell, with whom plaintiff alone transacted the business. The rate furnished was from Minneapolis to Boston, to which the local agent added the printed schedule-rate from Mitchell to Minneapolis.

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It may be reasonably inferred that the local agent would have quoted a through rate in the first instance without consulting his superior officer had he known the tariff from Minneapolis to Boston, because he testified that he never made a rate beyond the company's line unless he had a printed rate, and that in this case, when he obtained the rate over connecting lines, he merely added thereto the rate from Mitchell to Minneapolis, and simply informed the plaintiff what it would cost per hundredweight to ship the corn from Mitchell to Boston. Mr. Obeland, the local agent, and the only person with whom plaintiff dealt, testified positively that he was not authorized by any superior officer of the company to make a contract to ship a through car from Mitchell to Boston, and his evidence in that particular is undisputed. Plaintiff knew that the defendant was not operating a continuous line of railway from Mitchell to Boston, and knew that the agent at Mitchell was unable to quote him a rate beyond the point where the car would be transferred to a connecting line. According to plaintiff's own testimony, nothing was said by either party about a through car until after the contract to consign the corn over defendant's line was entered into. Here is the agreement, as stated by the plaintiff upon the witness-stand: "I told him, if he would give me as good or better rate than the Milwaukee road would do, that I would consign over his line of road. He said he could not give me a rate, a cut rate, but would write for instructions and see what he could do. That is all he said at that time. I next saw him a week or ten days afterwards in the Knights of Pythias hall. He then said he had a rate,—that he had got instructions, and had received a rate. That is all he said at that time. I then said I would ship over his road. That is all I said at that time." True it is, plaintiff testified that he made an agreement with the station agent a week or so later for a new car, from which the corn would not be transferred until it reached its destination, but in the absence of authority conferred by a qualified superior officer, or a course of dealing from which authority may be inferred, it is conceded in the majority opinion that a station agent, as such, has no power to bind his company by a contract to transport property beyond its own line.

No importance should be attached to the fact that a new Soo car was sent to Mitchell, because the agent testified that

he was never allowed to load a car off his company's line. The corn was billed to Minneapolis in care of the Soo line, and there is no claim that its contents were damaged while thus in transit. Defendant's liability ceased when the car reached the end of the company's route, and was delivered in good order to the next carrier. Comp. Laws, § 3905. Plaintiff paid the freight for the entire route to the company that carried the corn into Boston, and it does not affirmatively appear that defendant ever received any consideration for transporting the car from Mitchell to Minneapolis. If plaintiff, as stated by Judge KELLAM, believed that he had entered into a through contract, why did not he make a claim for damages against the defendant to the agent at his home station, with whom the purported agreement was made? There is nothing in the record to indicate that any demand for damages was ever made upon the defendant, but it does affirmatively appear that plaintiff, for fully a year after the shipment was made, looked to the company at Boston to whom he paid the freight. The following letters were received in evidence without objection:

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tinued.

EXHIBIT A.

" Butte Farm, Sept. 24, '91. *Dear Sir*—My claim will be in the hands of an attorney by Oct. 1. Can I expect anything like a settlement before that date, and avoid a suit?

" Yours truly,

" PAUL E. PAGE, Mitchell, S. D

B. D. Webber, Boston, Mass."

EXHIBIT B.

" Butte Farm, July, 14 1891. B. D. Webber, Boston, Mass.—*Dear Sir*—Last fall I shipped from this point a car-load of pop-corn, shipped in car No. 20,070 and consigned to James Spears, Boston. The corn was damaged in transit, and you instructed Mr. Spears to sell the corn for what he could, and that your company would make up the loss. Wm. F. Brooks & Co. have been looking after the claim, but in writing them I can get very little information. Will you please let me know in what shape the claim is, what the prospects for an early settlement, and what Brooks & Co. have done?

" Yours, respct.,

" PAUL E. PAGE, Mitchell, S. D."

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Assuming the evidence of plaintiff to be uncontradicted, and viewing it in a most favorable light, I find nothing to justify or support an inference that any authority was ever conferred upon agent Obeland to make a contract to carry the property of plaintiff beyond the defendant's line of railway, and the record discloses no conduct on the part of any superior officer from which a jury could infer such authority.

At the conclusion of the testimony, and before the case was submitted to the jury, counsel for appellant moved the court to direct a verdict for the defendant for the reasons: "That the

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alleged contract on the part of the plaintiff is void, as it is claimed to have been made with a station agent to ship a car beyond the defendant's line of road, to wit, from Mitchell to Boston, which the station agent has no authority to do without express authorization on the part of defendant company, and the evidence shows that he had no such authority. Upon the further ground that there is no evidence in the case to show that he was held out by the company as an agent to receive goods for it and to bind the company in shipping the corn in question from Mitchell to Boston; that there is no question of ostensible agency in this case, there being no proof to show that this agent ever received any goods from any person or persons at Mitchell, to ship to any point beyond the line of its road." It was said in *Stewart v. Railroad Co.*, 3 Fed. Rep. 768, that "in the absence of a special contract, the liability of a common carrier does not extend beyond the limits of his own route, and such contract is not established by proof that the carrier accepted the goods with a knowledge of their destination and named the through rate for the same." From the head note in *McCarthy v. Railway Co.*, 9 Mo. App. 159, I quote the following: "The giving of a through rate to the shipper by the carrier is not of itself evidence of a special contract to carry beyond the company's line."

It is as clearly out of the usual course of business for a railroad company to contract with reference to the use of other companies' lines as it is for a man to contract with reference to the use of his neighbor's horse and carriage; and in the face of the undisputed evidence that the defendant had nothing to do with the transaction, beyond the quoting of a rate from Minneapolis to Boston, and in the absence of anything to indicate a course of dealing or arrangement between the

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various lines over which plaintiff's property was transported, it is an exceedingly harsh rule that construes the furnishing of such information by a company to its station agent into an agreement entered into by a railroad company to carry property to a distant point over continuous lines not under the control or supervision of the company that receives such property for shipment. It follows, therefore, that the agent at Mitchell had no authority to make a binding contract to carry to Boston, and the mere naming of a partial rate by one having authority to bind his company by such a contract was simply to furnish information for the benefit of a proposed customer of his line of railway, and to hold that such advice constitutes evidence of an agreement to carry over connecting lines to distant points would be liable to make the officers of common carriers exceedingly cautious about furnishing the public with necessary information. I think the motion should have been sustained, and the judgment appealed from should be reversed.

MCCANN *et al.**v.*EDDY (George A.) *et al.**(Supreme Court of Missouri, Dec. 10, 1895.)*

Carriers of Merchandise—Liability for Negligence of Connecting Carrier—Statutory Prohibition against Limiting Liability.—Where a statute (Rev. St. Mo. 1889, § 944) provides that when a common carrier receives any property for transportation from one place to another such carrier shall be liable for the negligence of any other carrier to which such property may be delivered, a carrier which contracts for transportation to a point beyond the termination of its own route cannot, by contract, exempt itself from liability for the negligence of the carrier which completes the transportation. (*Page 636.*)

State Regulation of Commerce—Rev. St. Mo. 1889, § 944, Not Repugnant to U. S. Const., Art. 1, § 8.—The construction above given to said statute does not make it repugnant to that provision of the Constitution of the United States (Art. 1, § 8) which gives to congress alone the power to regulate commerce among the states, as the act in no way operates as a regulation of trade and business among the states, nor imposes any restriction on transportation. (*Page 639.*)

SHERWOOD, J., *dissenting.*

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IN BANC. Appeal from Monroe county circuit court.
Affirmed.

Jackson & Montgomery, for appellants.

J. H. Rodes and *R. B. Bristow*, for respondents.

MACFARLANE, J.—This action is to recover damages against defendants as receivers of the Missouri, Kansas & Texas Railway Company for negligence of duty in the transportation and delivery of 95 head of cattle from Stoutsville, in Monroe county, in this state, to Chicago, in the state of Illinois. Stoutsville is a station on the road operated by defendants. Hannibal is the eastern terminus of their road. From that point the Wabash Railway Company operates a road to Chicago. The cattle were delivered by defendants to the Wabash Company in a reasonable time, and in good order, by which they were carried to Chicago. The negligence complained of was committed on the Wabash road, and by its employés.

So much of the contract under which the shipment was made as is necessary to an understanding of the questions involved is as follows: “Rules and regulations: In case the owner or consignor agrees to hold these receivers free from liability from any and all causes enumerated in the following contract, also agrees to load, feed, water, and attend to the stock himself, etc., as specified therein, the rates agreed upon and specified in the contract will be given.”

“Live-stock contract, executed at Stoutsville station, Mo., Nov. 12, 1890: This agreement, made between George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, parties of the first part, and M. B. Smizer, party of the second part, witnesseth that: Whereas, the receivers of the Missouri, Kansas and Texas Railway transport the live stock as per above rules and regulations, and which are hereby made a part of this contract, by mutual agreement between the parties hereto: Now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the second party the live stock described below, and the parties in charge thereof as hereinafter provided, namely, six cars, said to contain 95 head of cattle m. or l. o. r., from Stoutsville station,

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Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union Stock Yards at Chicago, Illinois, at the through rate of 17½c. per hundred pounds, from Stouts-ville, Missouri, to Chicago, Illinois, subjects to minimum weights applying to cars of various lengths as per tariff rules in effect on the day of shipment, the same being a special rate, lower than the regular rates, or at a rate mutually agreed upon between the parties, for and in consideration of which said second party hereby covenants and agrees as follows: * * *

The first and thirteenth of these covenants are as follows:

“(1) That he hereby releases the party of the first part from the liability of common carrier in the transportation of said stock, and agrees that such liability shall be that of a mere forwarder or private carrier for hire. He also hereby agrees to waive, release, and hereby does release, said first party from any and all liability for and on account of any delay in shipping said stock after the delivery thereof to its agent, and from any delay in receiving same after being tendered to its agent.”

“(13) And it is further stipulated and agreed between the parties hereto that, in case the live stock mentioned herein is to be transported over the roads or road of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, the understanding of both parties hereto being that the party of the first part shall not be held liable for anything beyond the line of the Missouri, Kansas and Texas Railway, excepting to protect the through rate of freight named herein.”

The contract was signed by both parties, and under it defendants claim exemption from liability.

Defendants asked but the court refused to give this instruction: “The court instructs the jury that under the contract read in evidence, under which plaintiff’s cattle were shipped, the defendants are not liable for any damages sustained, by delays or otherwise, after said cattle were delivered by defendants to the next connecting carrier.” The court, of its own motion, gave this instruction: “If, from the evidence, the jury find that beyond the limit of a reasonable time for the delivery of plaintiff’s cattle at the Union Stock Yards at Chicago, Illinois, the Wabash Railway

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Company negligently delayed said delivery, and thereby directly caused pecuniary damage to plaintiffs in the disposition of said cattle, the jury will find for plaintiff, and, in default of such finding, the jury will find for defendant." The evidence tended to prove the negligence charged and the resulting damages. The judgment was for plaintiffs, and defendants appealed.

1. This appeal involves the interpretation of the contract under which the cattle were shipped, and a determination of the effect that should be given the clause exempting defendants from "all liability of every kind after the cattle left its road." As the contract must be construed so as to give proper effect to the statute, the interpretation of section 944 in its application to the contract is also necessary. That section is as follows: "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

This section was construed in the Dimmitt Case, 103 Mo. 440, 46 Am. & Eng. R. Cas. 699, and its application to the contract there in question was determined. In that case it was held that the general effect of the statute, and its evident purpose, were to apply to common carriers the English rule of duty and liability in respect to the carriage of property beyond their own route, as distinguished from the American rule, which was at the time recognized as the law in this state. In that case the goods were consigned to a point beyond the route of the receiving carrier, and there was no express limi-

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tation by contract not to carry to their destination. The court held that, under the statute, the receiving carrier was liable for the loss of the goods occurring through the negligence of the carrier to which it had delivered them for transportation to their destination. This ruling was in accord with the decisions of the English courts; but under the law as it existed in Missouri, prior to the statute, upon the facts shown to have existed, the receiving company would not have been liable for the loss. There is no doubt that the statute, by its very terms, has the effect of applying the English rule so far as it makes the receiving carrier responsible for the defaults of other carriers through whose agencies it undertakes to complete the contract of carriage.

This is as far as the decision in the Dimmitt case goes. But the statute can only be held to adopt so much of the English rule as is consistent with it. It cannot properly be held to abrogate the existing law in this state, unless inconsistent with it. The statute, ingrafted upon the law of this state, as it then existed, makes the rule by which we must be governed. The English law does not make it. To the extent, then, that the statute declares the English rule, the decisions of the English courts would be authority for its interpretation, but they would not be authority where the statute and the rule conflict. The statute must be interpreted in the light of our own law, and, so far as possible, in conformity to it. In the Dimmitt Case, *supra*, the court says: "By its provisions, the act of acceptance by a common carrier, of property to be transferred to a place beyond the terminus of its route, is evidence of a contract to carry such property to the place of its destination. The act of issuing a receipt or bill of lading for property to be transferred to a place beyond the terminus of the route of a common carrier is evidence of a contract by such carrier to carry such property to the place of its destination. This *prima facie* case the statute makes for the plaintiff on the facts stated. In order to defeat it, the defendant must show that, by specific agreement, it only contracted to carry the property to the terminus of its own line, or what is equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line." This is a fair statement of the interpretation given by the English courts

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to contracts for transportation beyond the route of the receiving carrier. Hutch. Carr. § 147; Lawson, Carr. § 238. The law as stated is also within the terms of the statute, and is inconsistent with the law of this state as previously declared by this court. Coates v. Express Co., 45 Mo. 238; Snyder v. Express Co., 63 Mo. 376.

The provision of the statute is that "wherever any property is received by a common carrier to be transferred from one place to another." This language does not restrict, but rather recognizes the right of the carrier to limit its contract of carriage to the end of its own route, and there deliver the property to the connecting carrier. There can be no doubt, then, that under the statute as well as under the English law, the carrier can, by contract, limit his duty and obligation to carriage over its own route. But it seems that, under the decisions of the English courts, a carrier can also limit his liability to a loss or damages occurring on his own route by specific agreement that it should only be so liable. In the Dimmitt Case the rule is stated to its full extent, though unnecessary to the decision in that case, there having been no attempt to make such limitation.

While under the decisions of this court, it had been held that a carrier could, by contract, limit its common-law liability of insurer, it was before the statute, and has been since, uniformly held that he could not, by contract or otherwise, relieve himself from liability for loss or damage occasioned by his own negligence, or that of his agents or employes. Such was the law when this statute was enacted. There is nothing in the statute that indicates an intention to change it. Indeed, it seems to be recognized, for the statute, by its terms, only declares a liability for loss or damage caused by negligence. The *dictum* of the court in the Dimmitt Case, to the effect that an agreement that a carrier should only be liable for loss or damage occurring on its own line is equivalent to an express contract to carry the property only to the terminus of its own line, cannot be taken as the law of this case, where there is an express contract and also an agreement for non-liability. Where the original undertaking is in doubt, such an agreement might be evidence of the intention of the parties in respect thereto. This question is not involved here, and need not be decided.

We cannot, therefore, give such an interpretation to the

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statute as would permit a carrier to contract for a through shipment and at the same time exempt himself from liability on account of the negligence of connecting carriers. Such an interpretation would in effect operate as a repeal of the vital provisions of the law which declare a conclusive liability in such case.

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liable for
damage by con-
necting lines.

The statute does not undertake to change the law in respect to liability of a carrier for his own negligence, but to extend it to connecting carriers as well, and declare a liability for negligence without regard to which was in fault. Under these views of the law, no difficulty is found in giving construction to the contract. The agreement to carry from Stoutsville to Chicago is absolute and unconditional. The thirteenth condition or covenant can only be regarded as an attempt, on the part of defendant, to relieve itself from the responsibility of answering for the negligence of the carrier by which it undertook to complete the contract. The statute forbids such qualification of the contract. It can only be held to relieve defendant from its common-law liability of an insurer. The ruling of the court in respect to giving and refusing the instructions mentioned was correct.

2. We are unable to see, as contended by the defendant, that the construction we give this statute makes it repugnant to that provision of the constitution of the United States which gives to congress alone the power to regulate commerce among the states. The act in no way operates as a regulation of trade and business among the states. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation for their services for transportation between the states, subject to congressional regulations. The statute merely prohibits a carrier who, by contract, undertakes to transport property to a point beyond its own route, from relieving itself of responsibility for neglect to properly perform its duty. It only imposes the duty and liability which the law, from considerations of public policy, imposes upon all common carriers in the transportation of property over their own lines, though they may extend into other states. A statute of Iowa which provided that no contract of a common carrier should exempt it from its common-law liability was held by the supreme court of that state not to be in conflict with the commercial power of congress prescribed

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by the constitution. *Hart v. Railroad Co.*, 69 Iowa, 490, 27 Am. & Eng. R. Cas. 59. See, also, to the same effect, *Solon v. Railway Co.*, (Iowa) 63 N. W. 692, and *Bagg v. Railway Co.*, 109 N. Car. 279; 49 Am. & Eng. R. Cas. 46.

The judgment is affirmed.

All the judges concur, except SHERWOOD, J., who dissents.

BROWN & HAYWOOD CO.

v.

PENNSYLVANIA CO.

(*Supreme Court of Minnesota, Jan. 28, 1896.*)

Carriers of Merchandise—Misshipment of Consignment by Carrier—Liability for Injuries to Same.—A common carrier received a shipment of goods to be carried to a point beyond its own line, with directions to deliver them to certain connecting carriers to be carried to their destination. At the same time the shipper made an agreement with the last connecting carrier to have the car containing the goods stopped at two intermediate points on its line, and certain portions of the goods delivered at each point; the balance to be carried to the point of destination, to which the goods were billed by the initial carrier. The initial carrier had no knowledge of this agreement, and wrongfully sent the goods by a different connecting carrier, whose lines did not reach the place of destination, but did reach one of said intermediate points, to which it carried the goods, and was proceeding to forward the whole of them to the place to which they were so billed, when plaintiff disclosed to it his contract to have the goods distributed to the three points, and demanded that it be complied with. Before complying with the same this carrier compelled him then and there to pay the whole freight for the whole route, and upon his doing so delivered him the goods destined to that point and undertook, at its own cost, to carry to each of the other points the portion of the goods destined to such points. In doing so one package of the goods was broken and destroyed. In a suit by the shipper against the initial carrier for the loss, *held*, the initial carrier became, by its wrongful act of diverting the goods from the designated route, an insurer of their safe delivery at the three places of destination, though two of those places were never disclosed to it. (*Page 642.*)

Same—Delivery by Carrier to Wrong Connecting Line—How Far Relieved from Liability to Shipper.—*Held* further, the transaction between the shipper and the carrier to whom the goods were wrongfully delivered did not amount to a delivery then and there to the shipper so as to relieve the initial carrier from its liability. (*Page 643.*)

APPEAL from Hennepin county district court.

Flandrau, Squires & Cutcheon, for appellant.

L. L. Longbrake, for respondents.

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CANTY, J.—The plaintiff, a corporation, delivered a car-load of glass to the defendant railway company at Tarentum, Pa., billed to Snohomish, in the state of Washington, via the Chicago, St. Paul & Kansas City Railway and the Northern Pacific Railway, and a bill of lading was issued by defendant accordingly. The defendant carried the car of glass over its own road, but wrongfully, by mistake or otherwise, sent the same over the Union Pacific Railway, instead of over the Northern Pacific Railway. A certain portion of the glass was for a customer of plaintiff, at Tacoma, Wash., another certain portion for customers at Seattle, Wash., and the balance for a customer at Snohomish. If the car had been sent over the Northern Pacific Railway, it would have arrived first at Tacoma, next at Seattle, and last at Snohomish; and before the car was shipped, plaintiff had made arrangements with the Northern Pacific Railway Company to stop the car at each of these places, respectively, and permit the glass destined for that place to be there unloaded and delivered, the car then to proceed to the next place; but none of these facts were stated in the bill of lading or known to defendant. Facts.

The Union Pacific Railway Company did not connect by rail with any of these points. The terminus of its railway line was at Portland, Ore. When the car arrived at that point, the glass was shipped by the last-named railway company to Seattle, by water, on its own vessel, to be there transshipped over the Northern Pacific Railway Company to Snohomish. But when the glass arrived at Seattle, and was placed on its wharf by the Union Pacific Railway Company, one Louderback, a broker who had negotiated the sale of the glass destined for Seattle, informed its agent of the wrongful deviation in the shipment, that all of the glass was not destined for Snohomish, of the points to which the different portions of it were destined, and the arrangements made with the Northern Pacific Railway Company to distribute it to these different points. Louderback also informed the Union Pacific Railway Company of the fact that the glass was at this time some 20 days overdue, and of the pressing necessity for the prompt delivery of the different portions of it to the different points of destination, respectively, to fulfil contracts, some of which were then in default, and others would be if prompt action was not taken.

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He also tried to get possession of the glass destined for Seattle, to fulfil the contracts made by him, but the Union Pacific Railway Company refused to deliver the same to him unless he paid all the freight due on all the glass over the whole route from Tarentum, amounting to \$533.80. After some further parleying, Louderback agreed to pay this freight, and the Union Pacific Railway Company agreed to deliver to him there the glass destined for Seattle, and at its own expense transport to Snohomish the glass destined for that point, and to Tacoma the glass destined for that point. The boats being too busy to carry the latter glass to Tacoma, the Union Pacific Railway Company undertook to have it transported by rail over the Northern Pacific Railroad to that point. In order to do so, it was necessary to have the glass transferred on a dray from the wharf to the depot of the Northern Pacific Railway Company. The Union Pacific Railway Company employed one Heath, a drayman at Seattle, to do this, and in doing so he permitted one of the cases of plate glass to fall against the wheel of the dray, whereby all of that package of glass was broken and rendered worthless. This action is brought against the defendant for damages for loss of the glass by reason of its wrongful acts in disobeying directions as to the connecting line over which the glass should be sent. The plaintiff recovered in the court below, and from an order denying a new trial defendant appeals.

Until after the glass was broken, neither plaintiff nor defendant had any knowledge of the new arrangements that were made by Louderback and the Union Pacific Railway Company for the distribution of the glass. Louderback was not the agent of the plaintiff, and had no authority from plaintiff to make these arrangements, but did it on his own responsibility, for the purpose of protecting the good-will of his own business. But plaintiff subsequently repaid him the freight which he so paid, and it is contended by appellant that plaintiff fully ratified his acts by so repaying him, and adopting the benefit of those acts. For the purposes of this case we will concede, without deciding, that this contention is correct, and that plaintiff has ratified those acts, and is as much bound by them as if Louderback had full original authority from it to make these new arrangements for the distribution of the glass. We

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will now consider the next step in appellant's position. Appellant concedes that, by misdirecting the goods beyond the end of its own line, the defendant was liable for conversion, and was therefore an insurer of the safe arrival of the goods at their destination, all of which is undoubtedly good law. But appellant further contends that plaintiff by its own act has released defendant from liability, that the new arrangements made with the Union Pacific Railway Company for the distribution of the goods "operated, in law, as a delivery of the goods by the Pennsylvania Company to the Brown & Haywood Company." Counsel argue: "The contract made between the plaintiff and the defendant provided that the goods should be carried to Snohomish, and no obligation rested upon defendant or the Union Pacific Company to deliver any of the goods at any point other than Snohomish.

* * * That contract required the defendant to deliver plaintiff's goods at Snohomish, but not elsewhere, and required the plaintiff to receive the goods at Snohomish, not elsewhere, and thereupon, but not otherwise, to pay defendant the amount of freight charges agreed upon. The Union Pacific Railroad Company had not, nor had any of its representatives at Seattle, any authority to alter this contract in any particular."

The fallacy of counsels' position consists in assuming that there was, in fact, any contract between the plaintiff and defendant to carry the goods to Snohomish. Defendant made no such contract. It merely agreed to carry the goods over its own line, and deliver them to the next designated carrier, with proper directions for their further carriage. There its contract and its duties ended. But this contract, made with defendant, was not the whole of plaintiff's contract. It had made another contract with the Northern Pacific Railway Company to distribute the goods at the three points aforesaid. It is true that defendant had no knowledge of the latter contract, but the latter contract did not concern defendant, or in any manner increase its liability, if it had rightfully performed its own contract; and we cannot see that the plaintiff was under any obligation to inform defendant of a matter which did not concern it. When plaintiff discovered the wrongful deviation of its goods by defendant, it disclosed to the carrier in whose possession it found its goods the whole contract,

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and demanded that the goods be distributed and delivered accordingly.

We cannot see but what it was both the right and duty of plaintiff, as between it and defendant, to disclose its additional contract to the Union Pacific Railway Company, and demand that the different portions of the goods be carried to their respective destinations as required by that contract. This the latter carrier refused to do, except on payment of the whole freight in advance. The payment of this freight, under the circumstances, can hardly be considered, as between plaintiff and defendant, a voluntary payment, which would ratify the wrongful act of defendant, but rather a payment under duress of plaintiff's goods, which it needed to fulfil its contracts. We cannot see that plaintiff has done anything more, at any stage of the transaction, than insist that its whole contract be carried out, except so far as it submitted to what was, as between it and defendant, an unlawful exaction of the payment of freight at Seattle, partly in advance, and it seems to us that this unlawful exaction should give the defendant no advantage. Louderback engaged Heath to carry this glass from the wharf to the Northern Pacific depot, but it appears that, in doing so, he was acting as the agent of the Union Pacific Railway Company, not as the agent of plaintiff. Defendant requested plaintiff to make every effort to collect the amount of the claim from the drayman, Heath, and give defendant credit for any amount so collected. Plaintiff accordingly brought an action against Heath in Washington, recovered a judgment for \$640, and collected thereon \$165.

2. Appellant contends that plaintiff's claim against defendant was satisfied by a settlement with Heath, whereby he was to pay \$200 on this judgment in settlement in full; but we are of the opinion that the evidence does not warrant the claim that any such settlement was made with Heath, or that, if made, there was any consideration to support it or make it binding.

This disposes of the case, and the order appealed from is affirmed.

ABSTRACTS OF RECENT DECISIONS

(1) **Connecting Lines** [(1) p. 649]—**Liability of Last Connecting Carrier for Wrongful Delivery.**—A railroad company which accepts from a connecting company goods consigned to a point whereat its own line terminates, and to be there carried by it, is liable to the owner of the goods for loss sustained by him because of the delivery of the goods to a person other than the consignee. *Cavallaro v. Texas & P. R. Co.*, (Cal.) 42 Pac. Rep. 918.

The rules in this country and England, respecting the liability of connecting carriers for negligence and misfeasance, are stated and commented upon by the court in the following language :

A number of contentions of appellant, without taking them up serially, may be answered in this wise: It is the established law of England: (1) That, when the carrier accepts for carriage goods directed to a destination beyond its own route, it assumes by the very act of acceptance, in the absence of any express contract on the subject, the obligation to transport them to the place to which they may be directed. This was first decided in what was known as the "Muschamp Case" (*Muschamp v. Railway Co.*, 8 Mees. & W. 421), and has been ever since steadily adhered to. (2) As an apparent corollary of the first proposition, the English courts have also held that in all cases included therein the first carrier becomes exclusively responsible for the carriage and safety of the goods to their destination, and, no matter by whom injured or lost, the first carrier alone can be sued by the aggrieved party, and any attempt to hold the subsequent or connecting carrier liable must, notwithstanding the loss may have occurred through its negligence, fail for want of privity of contract between such carrier and the injured party. *Hutch. Carr.* §§ 146, 147.

Upon the first of the foregoing propositions the American courts are divided. The majority of them, however, hold against the English doctrine, as unjust to the carrier, and as unnecessary upon grounds of public policy, and assert the true rule to be that in the absence of any contract, except such as is implied from the acceptance of the goods for carriage, the obligation of the carrier extends only to the end of his route, and a proper delivery there to the next succeeding carrier to further or complete the carriage; and, in order to be bound further, a positive agreement, either express or implied, is necessary. And this is called the "American rule." *Hutch. Carr.* § 149, and cases cited.

Upon the second proposition the courts of the United States, both federal and state, are believed to be, with a single exception, a unit in holding that, either with or without a contract under which the first carrier becomes liable for loss or injury to goods until they reach their destination, the owner may seek redress from any intermediate carrier who is in fault. The exception alluded to is the state of Georgia, and in that state the English rule is now mainly abrogated by statute. The theory upon which the connecting carrier is held liable for his own default or misfeasance to the owner is based upon the ground that the receiving carrier is the agent of the owner to forward and deliver to the next succeeding or connecting carrier, who, in turn, becomes the agent of the principal, and not the subagent of the first agent, and hence liable. Whatever may be the basis of the doctrine, it is one of well nigh univer-

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sal application in this country ; and as is said by Hutchinson, at section 150 : " The rule which allows the action against the carrier in fault, as well as against the one who is primarily responsible, certainly commends itself upon grounds of both justice and convenience, and, with the above exception [Georgia], is the universal law of this country."

The complaint in this case avers, among other things, the delivery of the property to defendant as such common carrier, and its receipt upon the agreement aforesaid (that is to say, to carry the same to New Orleans, and there deliver it to V. Lo Secco), and its misdelivery, whereby it was lost to plaintiff. If the defendant, as a common carrier, received property consigned to a person in New Orleans to be carried over its road terminating in that city, it became liable to the owner for negligence or misfeasance in doing so, under its common-law liability, whether there was an express contract or only such agreement as the law implies.

In *Church v. Railroad Co.*, (Okl.) 29 Pac. 530, relied upon by appellant, there was no allegation in the complaint that the goods were ever delivered to or received by the defendant. The last duty required of the common carrier is that of delivery. This is a duty imposed upon him by law. As soon as he accepts the goods, and whether so expressed or not, it becomes a part of his contract. He must not only deliver goods intrusted to him to carry, but becomes also responsible for their proper delivery. Hutch. Carr. § 338. The same author, at section 344, says: " No circumstances of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind ; and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned. * * * If, however, the delivery be made to the wrong person, whether by an innocent mistake, or through fraud practiced upon the carrier, such wrongful delivery will be a conversion." *Adams v. Blankenstein*, 2 Cal. 413.

Same—Same—Wrongful Delivery by Direction of Prior Connecting Carrier.—The defendant, the last of several connecting common carriers delivered the goods, at their destination, to a person other than the consignee, by reason of wrong directions given him by one of the prior connecting carriers, without the authority of either the consignor or consignee, and without the surrender of the bill of lading issued by the initial carrier. *Held*, such prior carrier did not have apparent authority so to order the goods delivered to such third person, and that defendant was liable for conversion of the goods. *Foy v. Chicago, M. & St. P. R. Co.*, (Minn.) 65 N. W. Rep. 627.

Same—Liability of Initial Carrier for Failure to Deliver to Another Line Not a Connecting Carrier.—An initial carrier is not liable for a failure to deliver goods to another line of railroad where it does not appear that the line of the other company had been connected with that of

the company receiving the goods for the purpose of shipping freight at the time the damage is alleged to have accrued, and there is proof tending to show that about the time in question some freight which had been received from the latter company had gone over the line of the former, but the uncontradicted proof is that there was no agent at the junction of the two roads whose business it was to receive and forward freight; that the second line had not yet been connected for that purpose, and that the freight which had gone over the road prior to or about the time of the alleged damage was prepaid freight; and that no other kind could be forwarded, as there was no one to assume responsibility for it. *St. Louis & S. F. R. Co. v. Marrs*, 60 Ark. 637.

Same—Liability of Initial Carrier for Loss Sustained by Disregard of Directions as to Delivery to Particular Connecting Carrier.—A shipment of potatoes which was directed by the shipper to be taken to its destination by a particular connecting carrier was refused by the latter because of a strike then prevailing on one of its connections. Thereupon the initial carrier delivered the shipment to another line having facilities for transportation to the point of destination. After delivery to that line the strike spread, and the next connecting carrier refusing to accept the potatoes, they were taken to a warehouse by the first connecting carrier and sold in the belief that they were perishable and that such a disposition was the best for all persons concerned. No notice of the deviation or of the sale was given to the shipper, although he could have been easily communicated with, and he declined to receive the proceeds of the sale. *Held*, that the initial carrier was liable to the shipper for the loss sustained; also that the shipper was not precluded from a recovery because of an effort made by him to secure payment from the road which sold the potatoes where it appeared that the effort was made at the instance of the initial carrier. *Louisville & N. R. Co. v. Odill*, (Tenn.) 33 S. W. Rep. 611.

The court presented the doctrine applicable, in its judgment, to the facts at bar in the following language: "It is insisted in the assignment of errors that, under the facts in this case, an emergency had arisen which justified a deviation in route, inasmuch as the one chosen by the shipper was closed by a strike, and the other, equally good, was open. There is no doubt that when, in case of an unforeseen necessity, the safety of the shipment demands it, a deviation from the route agreed upon with the shipper may be made, and will be justifiable—as, for instance, forwarding perishable freight by rail when a storm prevents a boat from proceeding upon its voyage; but, where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route without notice to him and instructions from him. *Ray, Neg. Imp. Duties (Freight Carr.)*, § 81; *Hutch. Carr.* § 14. See, also, *Railroad Co. v. Campbell*, 7 Heisk. 261. Unless justified by urgent circumstances, a deviation by the carrier will render it responsible for losses resulting, even from inevitable casualties, and the original carrier becomes, in effect, an insurer for the line he selects. *Ray, Neg. Imp. Duties (Freight*

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Carr.), § 79; Hutch. Carr. § 314. It clearly appears in this case that the plaintiffs could have easily been consulted by letter or wire, and their instructions taken, when it was found that the route selected was closed at Evansville, and the shipment safely held in the meantime; and, failing to do this, the defendant road must be held to be liable for any injury resulting upon the substituted route. It also clearly appears that the freight was not of such perishable nature as to necessitate the immediate transshipment, without notice to plaintiffs, to another route, in order to prevent their loss. The potatoes, it is shown, would have kept for several weeks without material injury or loss, though upon this point there is considerable conflict of testimony. It is, however, shown as a fact that the potatoes loaded at Nashville, and not shipped, remained on the cars for several weeks, and until the strike terminated, without injury. The failure subsequently to notify plaintiff that his potatoes had been sent to Peoria and ordered sold was also a dereliction of duty, which would render the carrier liable for damages. It is insisted that plaintiff should not recover because he made an effort to secure payment for his loss from the Peoria road, on which the transshipment was made. It sufficiently appears that this was done at the instance of the agent of the Louisville & Nashville Railroad Company, and with the assurance that it should not prejudice plaintiff's claims against that company."

Same—Presumption of Receipt of Goods by Connecting Line in Good Order [(3) p. 650]—*Georgia Statute*.—Goods received by a railroad company from a connecting line, to be transported over its own road, are, in the absence of a statement to the contrary in its receipt for the goods, presumed to have been received as in good order, within the meaning of section 2084 of the code, which declares that: "When there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, * * * the last company which has received the goods as in good order shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability." *Georgia R. & B. Co. v. Forrester*, (Ga.) 23 S. E. Rep. 416.

The court said: "'The policy of the law,' as was said by LUMPKIN, J., in discussing the section above referred to (*Forrester v. Georgia R. & B. Co.*, 92 Ga. 703), 'is to relieve the patrons of railroad companies of the burden and difficulty of ascertaining and fixing liability on that one of the several connecting carriers handling the shipment upon whose line the damage occurred'; and it is manifest that the purpose of the statute would be defeated if the carrier could cast this burden upon the consignee by giving a receipt containing no statement as to the condition of the goods. We think the statute means that the carrier shall be responsible to the consignee as having received the goods in good order, unless it shows that they were not in good order; and it cannot do this by showing a receipt which is wholly silent on the subject."

NOTES

[(1) p. 644] **Connecting Lines—Extent of Carriers' Right to Contract over Connecting Lines—Liabilities.**—It is well settled that in the absence of any special agreement or contract as to the trains of a railroad company going over connecting lines it is the duty of such carrier to carry safely to the end of its own line, and there deliver to the next carrier on the route, and by so doing the initial or intermediate carrier is discharged. *Rickerson R. N. Co. v. Grand Rapids & I. R. Co.*, 67 Mich. 110, 32 Am. & Eng. R. Cas. 487.

In other words, there is no law requiring carriers to assume any liability beyond their own lines. If, then, it is done, it must be voluntarily done, by special contract. And for such service the carrier has the right to exact of the shipper a consideration therefor, because the service is an accommodation in many ways. The carrier may charge greater rates, or he can require that in consideration of such routing and through rate his liability shall be limited; in either event the consideration is a valid one on both sides. *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 590; *Baltimore & P. S. B. Co. v. Brown*, 54 Pa. St. 82; *Pennsylvania R. Co. v. Berry*, 68 Pa. St. 277; *Evansville & C. R. Co. v. Androscoggin Mills*, 22 Wall. (U. S.) 594; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318; *Cutts v. Brainard*, 42 Vt. 568; *Root v. Great Western R. Co.*, 45 N. Y. 530; *Hills Mfg. Co. v. Boston & L. R. Corp.*, 104 Mass. 135.

(1a) Unless forbidden by its charter a railroad company may contract for a shipment over connecting lines, *Railroad Co. v. Pratt*, 22 Wall. 123; and having done so is liable in all respects upon them as upon its own lines. In such a case the shipper is authorized to assume that the carrier has made the requisite arrangements to fulfil its obligations. *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258; *citing Great Western R. Co. v. Blake*, 7 H. & N. 986; *Weed v. Saratoga & S. R. Co.*, 19 Wend. (N. Y.) 534; *Knight v. Portland, S. & P. R. Co.*, 56 Me. 234.

If carriers agree to carry beyond their own lines, or assume other duties and obligations not required by law, they have a right to demand a remuneration for the same, and it may be done in any way they see proper, provided it is reasonable and fair. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 16 Am. & Eng. R. Cas. 57; *Baltimore & O. R. Co. v. Green*, 25 Md. 72.

The obligation of the first or any carrier other than the final carrier is discharged when he has safely delivered the goods to the next succeeding carrier to whom such delivery is required in order to complete the transportation, unless such first or preceding carrier is bound to carry the goods to destination. *Detroit & B. C. R. Co. v. McKenzie*, 43 Mich. 609, 9 Am. & Eng. R. Cas. 15; *cited and followed* in *Rickerson R. N. Co. v. Grand Rapids & I. R. Co.*, 67 Mich. 110, 32 Am. & Eng. R. Cas. 487.

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When a common carrier receives goods for transportation marked to a particular destination beyond its own line, it is bound, under an implied agreement, to carry them to and deliver them at that place. *Wabash, St. L. & P. R. R. Co. v. Jaggerman*, 115 Ill. 407, 23 Am. & Eng. R. Cas. 680.

When goods are shipped and must pass through the hands of several intermediate carriers before arriving at the place of destination, the duty of each intermediate carrier is to transport the goods safely to the end of his route, and deliver them to the next carrier on the route beyond. *McDonald v. Western R. Corp.*, 34 N. Y. 497; *Angle & Co. v. Mississippi & M. R. Co.*, 9 Iowa 487; *Eagle v. White*, 6 Wheat. (U. S.) 505; *Parker v. Flagg*, 26 Me. 181; *Michigan Cent. R. Co. v. Ward*, 2 Mich. 538; *Ostrander v. Brown*, 15 Johns. (N. Y.) 39; *Gibson v. Culver*, 17 Wend. (N. Y.) 305.

A contract whereby the liability of a railroad company is sought to be extended beyond the carriage of the goods to the terminus of its own line, and delivery of the same to a connecting carrier, will not be inferred from loose and doubtful expressions, but must be established by clear and satisfactory evidence. *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25.

(2) The taking of a through fare by a railroad company, on the receipt of a shipment for transportation to a point beyond its own terminus, does not establish liability of the company beyond its own line. *Id.*

(3) The presumption is that goods transported by several successive carriers came into the possession of the last carrier in the same order and condition in which they were delivered to the first carrier, there being no direct evidence to the contrary. *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506; *Leo v. St. Paul, M. & M. R. Co.*, 30 Minn. 438; *Laughlin v. Chicago & N. W. R. Co.*, 28 Wis. 204; *Smith v. New York Cent. R. Co.*, 43 Barb. (N. Y.) 225; *Dixon v. Richmond & D. R. Co.*, 74 N. Car. 538, 2 Am. & Eng. Ency. Law p. 783; *Brintall v. Saratoga & W. R. Co.*, 32 Vt. 665.

The last of a series of connecting lines over which freight is transported is liable for loss or damage to the shipment, subject to the limitations stipulated for in the contract of shipment by the first line, unless it appears that the loss did not occur on the road sued. The burden of proof is upon said road to show that the loss did not occur on its line. *Memphis & C. R. Co. v. Halloway*, 9 Baxt. (Tenn.) 188.

But it has been held that a railroad company which contracts to carry passengers and their baggage beyond the limits of its own road is liable for losses which occur on any part of the route in respect to which the contract is made. *Weed v. Saratoga & S. R. Co.*, 19 Wend. (N. Y.) 534.

A railway company which, in the usual course of business, receives goods consigned to a point on its line from a connecting carrier which has carried the goods to its termination is entitled to its rea-

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sonable freight charges, although the consignor had directed that the goods should be carried from the terminus of the first carrier to their destination by another carrier than the one to which they were delivered, there being no evidence that the latter knew of such directions. *Price v. Denver & R. G. R. Co.*, 12 Colo. 402; *citing Briggs v. Boston & L. R. Co.*, 6 Allen (Mass.) 246; *Patten v. Union Pac. R. Co.*, 29 Fed. Rep. 590; *Higgins v. Armstrong*, 9 Colo. 38; *Schneider v. Evans*, 9 Am. Law Reg. (N. S.) 536, and note.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

v.

WALLACE (Benjamin F.).

(*United States Circuit Court of Appeals, 7th Circuit, Feb. 23, 1895.*)

Carriers of Merchandise [(1) p. 565]—**Right to Limit Liability** [(1) p. 677]—**Right to Contract as Private Carrier**.—Common carriers of merchandise may make reasonable contracts as private carriers, and may limit their liability accordingly. (*Page 657.*)

Same—Same—Facts in Case at Bar.—A railroad company, as a common carrier of merchandise, entered into a special contract in writing with the proprietor of a circus to haul a special train consisting of cars owned by the proprietor of the circus and containing the circus property and equipment, and also to transport the performers, between certain points at specified dates, and for a charge considerably less than the regular rate for the transfer of passengers and freight. The contract provided that in consideration of the reduced rate and the increased risk to the property of the railroad company in running such special train, the company should not be held liable for any damage to the persons or property of the circus company from whatever cause arising. The railroad company did not regularly, or as a custom, haul such special trains of private cars, or hold itself out to transport persons and animals and freight upon the same trains. *Held*, that, under the circumstances of this case the railroad company, in conveying the property of the circus by such special train, acted as a private, and not as a common carrier, and that as such private carrier it might lawfully make the contract providing against liability for damage or injuries, and that such contract was binding upon the parties. (*Page 658.*)

IN ERROR to the circuit court of the United States for the northern division of the northern district of Illinois.

The facts in this case are fully and properly stated in the brief of counsel for plaintiff in error, as follows: "This is a writ of error prosecuted by the Chicago, Milwaukee & St. Paul Railway Company, defendant
below, to reverse a judgment of \$8000 recovered against it in

Facts.

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the lower court by Benjamin F. Wallace, the plaintiff below, for loss and injury to certain property comprising part of the belongings and equipment of a circus owned by Wallace, and for the loss of performances of the circus caused by two separate accidents happening upon the railroad company's road, while it was transporting the circus in a special train composed of cars belonging to Wallace. Plaintiff's declaration is in trespass on the case for negligent violation by defendant of its duty as a common carrier. It contains two counts: The first count avers that on the 7th day of July, 1892, the defendant was possessed of and operating a certain railroad and railroad tracks in the states of Wisconsin and Iowa, and was operating and controlling certain locomotive power and engines upon and along its said railroad and tracks; that the plaintiff was the owner of a certain circus known and described as the 'Cook & Whitby Circus,' consisting, besides employes, of a large number of horses, wagons, tents, harnesses, and a large quantity of other property, effects, and paraphernalia, and was also the owner of twenty-four cars; that on the said 7th day of July, 1892, at the city of Prairie du Chien, in Wisconsin, the defendant then and there received, as common carrier, the aforesaid twenty-four cars of the plaintiff, containing the aforesaid property and effects of the plaintiff, constituting said Cook & Whitby's Circus, and the people connected therewith, to be safely transported to the town of Maquoketa, state of Iowa, and to be safely delivered there to the plaintiff on the 8th day of July, before 9 o'clock of the forenoon of that day.

The plaintiff avers that it was the duty of the defendant to provide safe, strong, and efficient locomotive power for the transportation of said cars, with the property and effects of the Cook & Whitby Circus, and it was also the duty of the defendant to construct and maintain its tracks and roadbed, at and near the station known as 'Sny Magill,' in the state of Iowa, in a safe and suitable condition; that the defendant negligently failed to provide strong and efficient locomotive power, and negligently failed to construct and maintain its tracks and roadbed in a safe and suitable condition at said point near Sny Magill, and that in consequence four of said cars were damaged, twenty-four horses killed, other horses injured, and a large amount of harness was damaged; also that by reason of the accident plaintiff was prevented from giving

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performances of the circus, which he had advertised, in the vicinity of the town of Maquoketa and the city of Davenport, in the state of Iowa, and thereby lost the profits he would have made had he been able to give said performances.

The second count of the declaration avers that on the 6th day of July, 1892, the defendant was possessed of and operating and controlling a certain railroad and railroad tracks in the state of Wisconsin, and operating and controlling certain steam locomotive power and engines upon and along the said railroad and railroad tracks; that upon said day the defendant, at the city of Richland Center, in the state of Wisconsin, received as a common carrier the aforesaid twenty-four cars of the plaintiff, containing all the aforesaid property and effects of plaintiff, constituting said Cook & Whitby's Circus, to be transported, by means of fit and adequate locomotive-engine power to be furnished by the defendant, over the railroad and tracks aforesaid, from said city of Richland Center, in the state of Wisconsin, to the said city of Prairie du Chien, in the state of Wisconsin, and to deliver the same at Prairie du Chien on the 7th day of July, 1892, at or before the hour of 9 o'clock in the forenoon of that day; that it was the duty of the defendant to have provided safe and proper appliances at a certain switch located at and near a point south of said Richland Center, and to keep proper and sufficient lights and signals placed at and near said switch to indicate whether said switch was open or closed; that the defendant negligently failed and omitted to perform its duty in this regard, and that by reason thereof the locomotive hauling plaintiff's cars was derailed; that the defendant failed to proceed with due and proper diligence to get its locomotive engine back onto the main track, and that in consequence plaintiff's cars were delayed so long that they did not reach the city of Prairie du Chien in time to give performances which had been advertised there. The defendant pleaded the general issue to the entire declaration, and afterwards a special plea to the jurisdiction of the court, which was subsequently stricken from the files by order of the court.

Facts continued.

" On the trial it appeared that the plaintiff's cars and property were hauled by the defendant under a special contract made and executed June 1, 1892, by the railroad company

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and by the plaintiff, Wallace, through their duly authorized agents. This special contract reads as follows:

“ ‘ This agreement, made and entered into this 1st day of June, A.D. 1892, by and between the Chicago, Milwaukee & St. Paul Railway Company, party of the first part, and Cook & Whitby Circus, party of the second part, witnesseth: The party of the first part agrees to run a special train, consisting of ten flat cars, six stock cars, six passenger cars, two advertising cars, in all twenty-four cars, to be furnished by the party of the second part, to run between as below, and as below:

Leaving:

Shakopee to Hastings, June 29th.....	\$180
Hastings to Redwing, June 30th.....	180
Redwing to Faribault, July 1st.....	180
Faribault to Decorah, July 2d.....	225
Decorah to Boscobel, July 4th.....	200
Boscobel to Richland Center, July 5th.....	180
Richland Center to Prairie du Chien, July 6th.....	200
Prairie du Chien to Maquoketa, July 7th.....	200
Maquoketa to Davenport, July 8th.....	180

“ ‘ Deliver to Chicago, Rock Island & Pacific Railway at Davenport, where they leave our line, and carry on said special train, as before described, the circus property of said party of the second part, together with the people properly connected therewith, so far as the same shall be loaded on said train. The said train to be run so as to arrive at its several destinations at or about 6 o'clock in the morning, provided the same shall be loaded and ready to start in time to reach its several destinations at said hour. In consideration thereof the said party of the second part hereby agrees to pay to the said party of the first part the sums as specified above per day in advance, (which said sum is a reduction from the usual and regular rates charged by said party of the first part for transportation services of the kind and nature above specified) the sum to be paid to the agent of the said party of the first part at the station from which the next succeeding run is to be made, it being mutually understood that no charge will be made for the use of train or trainmen on Mondays, when the runs for those days are made on the Sunday immediately preceding; and said party of the second part also

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agrees to load and unload said cars. In consideration of the agreement of the said party of the first part to run said special train as above specified, and at and for the reduced rates above named, and also in consideration that, by the running of said special train as above specified, the said party of the first part increases the risks and dangers of operating its railway, and subjects its own property to a greater liability of being damaged, and in further consideration of the premises, said party of the second part does hereby covenant and agree to release and discharge said party of the first part of and from any and all liabilities for claims and damages of every name and nature, by reason or on account of any accident or injury, from whatever cause, that may occur to, or may be suffered or sustained by, any one, or all, of the persons composing or attached to said circus company, or to the cars or other property of said party of the second part, while in or on said train or upon any of the premises belonging to or used by said party of the first part, or by reason or on account of any delays that may occur in the running of said special train, or by failure to reach the several points of destination, at the specified time. And, in and for the consideration last above mentioned, said party of the second part does hereby further covenant and agree that he will protect, and forever hold free and harmless, the said party of the first part, from any and all damages or claims for damages, that he or they may sustain or incur by reason of any accident or injury that may happen to or be received by any one or more of the several persons composing or attached to said circus company, or permitted by said party of the second part to ride upon said train, or upon any of the premises belonging to or used by said party of the first part. J. H. HILAND, for the Chicago, Milwaukee & St. Paul R. Co. J. M. HAMILTON, for Cook & Whitby.'

"The plaintiff offered evidence tending to show that at a point near Sny Magill, on the defendant's road, and while plaintiff's special train was being transported from Prairie du Chien towards Maquoketa, certain of plaintiff's cars were derailed and thrown down an embankment; that as a result twenty-four horses belonging to plaintiff were killed outright, and four others died afterwards from injuries received, and about forty other horses were permanently injured; also that serious injury was done

Facts continued.

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to a large number of sets of harness belonging to the plaintiff, as well as to the cars derailed, and that the plaintiff was prevented from giving and lost probable profits of, performances of his circus at Maquoketa and Davenport, which he had advertised at considerable expense. Plaintiff's evidence tended to show that the derailment was caused by defective roadbed at the point of accident, and by reason of the fact that the locomotive used to haul plaintiff's train of cars was light and of insufficient power. Plaintiff's evidence also showed that, on the evening of the 7th of July, plaintiff's special train, after starting from Richland Center towards Prairie du Chien, was stopped by reason of the engine running off the track at a misplaced switch a short distance out of Richland Center; that this accident caused a delay of several hours, and thereby prevented the plaintiff from giving, and lost probable profits of, performances at Prairie du Chien, which he had advertised at considerable expense. His evidence tended to show that the accident was caused by negligence of the defendant, and that the delay was greatly aggravated by the failure of the defendant to take proper steps for replacing the locomotive upon the track. At the close of the plaintiff's case, defendant moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled by the court, and an exception to the ruling duly taken.

" The testimony of the defendant tended to show that the accident at Sny Magill was not caused by the defective condition of the roadbed, or by reason of insufficient power in the locomotive used in the hauling of plaintiff's cars, but was caused by the breaking of an axle under one of plaintiff's cars; and that the accident to the switch at Richland Center, and the delay there, was not caused by any neglect or misconduct of the defendant or its servants. At the close of the evidence, the defendant requested the court to give certain written charges to the jury, instructing them that the defendant was not a common carrier, or subject to the liabilities of a common carrier, in accepting and transporting plaintiff's train of cars, and the property therein contained; that the defendant was therefore not restrained or controlled by rules applicable to contracts made by common carriers in the transaction of their ordinary business; and that the agreement releasing and discharging the defendant from any and all liability for claims and damages, of whatsoever nature, must control the rights

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of the parties, and should be enforced in favor of the defendant. The court refused all these requests, to which rulings exceptions were duly taken. The court, in substance, instructed the jury that the clause of the special contract exonerating defendant from all responsibility for loss or damage to plaintiff's property from any cause whatever was contrary to public policy, and void, in so far as it covered loss or damage occasioned by the gross negligence of the defendant or its servants, but was valid in all other respects; that if the jury found from the evidence that the defendant was guilty of gross negligence in not furnishing sufficient motive power and in not keeping its roadbed in proper condition, and that the damage to plaintiff was caused thereby, they should find for the plaintiff, notwithstanding the clause in the special contract exonerating defendant from liability. The jury thereupon brought in a general verdict for the plaintiff for \$8000, and the court, after overruling defendant's motion for a new trial, entered judgment on the verdict, and from that judgment the plaintiff in error, the defendant below, prosecutes this writ of error."

Edwin Walker and J. Ralph Dickinson, for plaintiff in error.
William H. Barnum, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge (after stating the facts).—Proper assignments of error having been made by plaintiff in error, the main question in this court, as it was below, is whether the railroad company, in carrying the plaintiff's circus people, animals, and outfit, under the special contract in evidence, assumed the relation of a common carrier for hire. If it did, then the verdict must stand. If it did not, then the contract itself was a good defence to the action; and the whole case seems to depend upon this question. The court is of opinion that the railroad company had a right to make the contract with the defendant in error; that the contract was not against public policy, but was valid and binding upon the parties who made it, according to its terms and conditions. The railroad company is charged in the declaration as a common carrier of the persons and property named in the contract, but the contract itself is wholly ignored, and the declaration framed as though

Common and
private car-
rier—Distinc-
tion.

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no contract had ever been made. If the plaintiff had the right thus to disregard the contract, and sue the railroad company, as a common carrier, the recovery must stand, because in that case the company would be liable for any defect in its roadbed which common, or even extraordinary, prudence and foresight could remedy. It would also be liable for the negligence of its own employés, and for any insufficiency in the engine or engines employed to move the plaintiff's cars, which ordinary prudence and foresight may have remedied. But if the company, in carrying the plaintiff's property under the contract and in the circumstances in which the undertaking was entered into, was not acting as a common carrier of the plaintiff's goods, but in the capacity of an ordinary private carrier for hire, then the company had the right to make the contract, and both parties will be bound by its terms.

That the company, in carrying the goods under the contract, was a private, and not a common or public, carrier, is the conclusion which the court has reached. There was no evidence offered that the railroad company had ever carried similar goods for Wallace before in his own private carrier by contract becomes private carrier. cars, or that it had ever carried or held itself out to carry goods in that manner for others, and there is no presumption that railroad companies would do so. We know from common observation that they do not hold themselves out as common carriers of wild and domestic animals to be transported in the private cars of the owners, and loaded in a manner agreeable to the owners; persons, animals, horses, and other property being carried upon the same train, which is operated at irregular times and seasons, at the convenience of the owners of such cars. They ordinarily operate their freight trains and passenger trains separately, and upon time schedules prepared in advance by experts for the company, and with a view to reduce the danger of accident to a minimum. Here was a special contract in writing, wholly different from the ordinary bill of lading, providing for the hauling of a special train of cars, belonging wholly to the defendant in error, to be loaded as he pleased with persons, wild animals, domestic animals, and other property, and to be run on special time, the hours of departure to depend upon the time when the plaintiff should have his cars loaded and ready to start. Wallace was to be wholly responsible for the loading and the unloading as well as for the care

of the property while in transit, the only duty of the railroad company being to haul the cars.

Another significant provision of the contract is that the property was to be carried at greatly reduced rates, in consideration of which the plaintiff was to assume all the risks of accidents, releasing the company therefrom. If this provision of the contract, as no doubt it was, was binding upon the railroad company, why not upon the plaintiff? The obligation was mutual. Why could not the railroad company say: "You wish your property carried in your own private cars, which is contrary to our usual rules and regulations, and at greatly reduced rates. You wish your entire circus troupe, horses, animals, and all the paraphernalia and accompaniments of a circus, carried for less money than at our rates as common carriers it would cost you to have the persons alone of your company transported, and you desire that they be carried at special times, also contrary to our rules as common carriers, and which materially increases risks in our business. Now, here are our roadbed and our engines. They have answered our own purposes of transportation fairly well. If you wish to take upon yourself all risk of damage by accident, we will accept your proposition, and carry at the rates proposed." There is nothing unlawful in this, unless we assume that the railroad company cannot carry property or persons at all, except as common carriers, which is against all rule and precedent.

Same—Carrying at reduced rate as element of changing carrier's character.

No common carriers undertake to carry every species of property, in respect to which they have not held themselves out as common carriers. They may contract as private carriers, and in that case they may make any reasonable contract. The railroad as a common carrier could not enter into such a contract as this, because it cannot as a common carrier limit the liability imposed upon it from considerations of public policy. But the case is different in respect to property of which it is not a common carrier. If any authority were needed upon so plain a proposition it is not difficult to find.

Right of common carrier to contract as private carriers.

In Hutchinson on Carriers, (2d ed., § 44) it is stated: "A common carrier may, however, undoubtedly become a private carrier or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. The relation in such a

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case is changed from that of a common carrier to that of a private carrier, and, where this is the effect of a special arrangement, a carrier is not liable as a common carrier, and cannot be proceeded against as such."

Again, at section 73, it is stated: "And, even as to such carriers as are *prima facie* public or common carriers, it may be shown that in the particular instance, or under the circumstances of the case, they did not undertake to transport, and are not liable as common carriers."

Again, at section 56a, par. 2, it is stated: "In the second place, in order to charge one as a common carrier of goods, the goods in question must be of the kind to which his business is confined. No carrier undertakes to carry all kinds of goods, but only such as are of the description which he professes to carry. A common carrier is therefore not liable as such, where, by special agreement, as a matter of accommodation, merely, he undertakes to carry a class of goods which it is not his business to carry."

Again, at section 56b, it is stated: "Common carriers of goods do not undertake to carry by any or all means, but only by those means or methods, and over the route, to which their business is confined. * * * And even if a carrier should, in a particular instance, undertake, by a special contract, to carry goods by unusual and exceptional methods or routes, his liability would be based on his contract, and not on the ordinary rules governing common carriers."

In the case of *Railroad Co. v. Lockwood*, 17 Wal. 357, at page 377, the court say: "A common carrier may undoubtedly become a private carrier, or bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry."

There are also two recently decided cases, one before the supreme court of Michigan, and the other before the supreme judicial court of Massachusetts, where a question almost identical with the one at bar was adjudged in the same way. *Coup v. Railway Co.*, 56 Mich. 111, 18 Am. & Eng. R. Cas. 542; *Robertson v. Railroad Co.*, 156 Mass. 525.

The declaration charges the defendant specially as a common carrier. The court held that it was not a common carrier in respect to the property which it undertook to carry under the contract, but nevertheless instructed the jury that: "The contract made it the duty of the defendant to furnish reason-

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able safe and sufficient motive power to haul the cars of the plaintiff over the specified portion of its road, and the defendant will be liable if it failed, while attempting to perform its contract, to furnish such character of engine or motive power, and damage resulted therefrom to the plaintiff's property or business. And under such contract defendant was bound to have a reasonably safe roadbed, over which the cars and property of the plaintiff could be transported. If its roadbed was not in a reasonably safe condition, but was out of repair, so as to be unsafe and dangerous, and the defendant knew this fact, or by reasonable diligence could have known it, and the derailment of plaintiff's cars, and injury and damages to his property, was occasioned by such insufficient and insecure track and roadbed, then the defendant would be liable for such injury and damage." Thus allowing a recovery upon a cause of action nowhere hinted at in the plaintiff's declaration. The plaintiff, if he recover, should recover according to his declaration. *Kimball v. Railroad Co.*, 26 Vt. 247; *White v. Railway Co.*, 2 C. B. (N. S.) 7.

But independent of this principle, we do not think there is any middle ground upon which to rest a recovery in this case. The railroad company was either liable as a common carrier as charged in the declaration, or it was not, and, if not, then the contract it made with Wallace, by which he assumed the risk of accident, was valid and binding. By the contract the defendant in error assumed all risk from accident, and for a proper consideration released and exonerated the railroad company from all damage occasioned thereby. He has got what he bargained for, or, if not, can sue upon his contract, but he must abide by its conditions.

The judgment of the court below should be reversed, and the cause remanded, with instructions to the court below to award a new trial.

THOMAS (Anthony J.) *et al.*

v.

LANCASTER MILLS OF CLINTON, MASS.

(United States Circuit Court of Appeals, 7th Circuit, Jan. 6, 1896.)

Carriers of Merchandise [(1) p. 565]—Liability for Destruction of Goods Resulting from Delay in Transportation.—The mere fact that a negligent delay by a common carrier in the transportation of the goods by a fire which occurred during such negligent delay in the transportation, does not render such delay an approximate cause of the loss; and where the negligent delay is the only fault attributable to the carrier, it may be added, whether under the conditions of a bill of lading limiting the liability in cases of fire, there could be a recovery, as such delay would not of itself produce the loss, there being no casual connection between the negligent act and the injury. (*Page 666.*)

Same—Limitation of Liability [(1) p. 677]—Exemption from Liability for Loss Resulting from own Negligence [(2) p. 682].—A common carrier cannot contract for exemption from liability occasioned by its own negligence. Therefore, a stipulation in a bill of lading which exempts the carrier from liability for loss while the property is in transit, or at places of transshipment, does not relieve the liability of the carrier for loss resulting from its negligent exposure of the property during a negligent delay in transportation, especially where the dangers are such that ordinary foresight should have guarded against them. (*Page 667.*)

Same—Destruction of Property at Place of Transshipment—Liability of Company in Case at Bar.—A railway company received for transportation some cotton, which it placed upon river barges for carriage to another city where it was to be placed on its cars. By direction of the company, the barges containing this cotton were detained a mile or two below the place exclusively used for the delivery of freight consigned to the company, and at which point the main channel of the river was closer to the shore than to any other point in the vicinity, so that passing steamers there came closer to the shipping than at other points. The congestion of shipping at that point had the effect to place the barge farther out in the river than ordinarily, and so closer to the passing steamers. The prevailing winds at that season of the year were from the steamers towards the barges, and the barges were exposed on the other side to sparks from passing trains upon the high bank of the river. After the barges had been moored at this point and thus exposed to sparks from the trains and passing steamers for 17 days, the cotton caught fire from a passing steamer. *Held*, that the company wrongfully and negligently exposed this cotton to danger by placing it in such an exposed position, and was, therefore, liable. (*Page 669.*)

APPEAL from the circuit court of the United States for the southern district of Illinois. *Affirmed.*

Thomas v. Lancaster Mills

Limiting Liability

The Cairo Division of the Wabash, St. Louis & Pacific Railway, extending from Cairo, Ill., to Tilton, Ill. (hereinafter termed the railway company), was, from and after the 22d day of April, 1885, operated by the appellants as receivers, under appointment by the circuit court of the United States for the southern district of Illinois, in a suit brought in that court for the foreclosure of a mortgage upon that division of the railroad. In the course of such operation the receivers employed an agent at Memphis, Tenn., to secure shipments of property for transportation over the line of railway in question. Such agent had authority to employ steamboat and barge lines to transport cotton from Memphis and other points on the Mississippi river to Cairo, under bills of lading issued by him as such agent, contracting for transportation from the point of shipment to the final destination at the mills or factories in the East. He also had authority to contract for the shipment of cotton from Memphis to its final destination at the East by all-rail transportation. In November and in the early days of December, 1886, the corporation, Lancaster Mills, purchased, through William Bowles & Sons, of Memphis, Tenn., one thousand bales of cotton, which were delivered to the agent of the receivers for shipment to Clinton, Mass., and for which the agent gave through bills of lading to William Bowles & Sons. The several bills of lading were of like tenor and effect, and acknowledged the receipt in apparent good order of the bales of cotton referred to marked "L. T. 1/300/B/c. To order. Clinton, Mass. Notify Lancaster Mills. River to Cairo. From Memphis to Clinton, Mass. Cotton. Per 100 pounds, 58c."

The bill of lading recites that the packages are to be transported by the railway company in question, and forwarding lines with which it connects, until the said goods and merchandise shall have reached the point named in the contract, upon certain terms and conditions stated. The only condition necessary to be noticed here is that the railway company and forwarding lines shall not be liable for "loss or damage to any article or property whatever by fire or other casualty while in transit, or while in depots or other places of transshipment, or at depots or landings at points of delivery, nor for loss or damage by fire, collision, or the dangers of navigation, while on the seas, rivers, lakes, or canals." Seven hun-

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dred bales of the cotton mentioned were loaded at Memphis under shipping instructions given by the agent of the railway upon Barge 49 between December 2d and December 9th, and constituted part of 2072 bales of cotton, the cargo of the barge. The bill of lading issued by the owners of the barge affirmed that they were shipped by the agent of the railway company, to be delivered without delay (the dangers of navigation, fire, explosion, and collision excepted), at the port of Cairo, Ill., to the railway company or assigns. This barge was in all respects a carrier of the first class, well manned and carefully constructed to guard against fire, as were also the steamboat and other barges, which proceeded together. The steamboat R. S. Hayes, with five barges in tow, including Barge 49, arrived at the port of Cairo at midnight, between the 10th and 11th days of December, occupying in transit the usual time of about 48 hours, and tied up, with the barges in tow, at the public levee at the foot of Tenth street. The usual place for the receipt of cotton by the railway company was at North Cairo, a mile and a half up the Ohio river from the city of Cairo. There was dispute whether the Hayes tied up at Cairo and did not proceed to North Cairo on account of ice in the river, or because of orders of the railway company. The steamer, with her barges, remained at Cairo until the 28th day of December, when the steamer caught fire, which was communicated to Barge 49, and the cargo of cotton destroyed. There was also dispute whether this delay of 17 days was caused by the refusal of the railway company to take the cotton, owing to the congestion of cotton freight at that time, or because of ice in the river.

There was also evidence proving that certain sums of money were paid by the agent of the railway company at Memphis to the shippers, and it was in dispute whether such payments were as rebate in freight rates, or for assumption of the marine risk upon the cotton between Memphis and Cairo. The Lancaster Mills had insured this cotton with the insurance Company of North America. On June 2, 1887, the Lancaster Mills filed in the court below its intervening petition, in its own behalf, and for its own use and benefit, seeking to recover the amount of the loss. In May, 1892, after payment to it by the insurance company of the amount of the loss, it filed its amended intervening petition, for the use of the insurance company, in

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tinued.

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which it is alleged as ground for recovery "that the loss of the cotton by said fire was the result of carelessness and negligence and delay of said receivers of said Cairo, Vincennes, and Chicago lines, while the said cotton was in their possession in course of transportation, in pursuance of the contract of transportation aforesaid." The answer alleged, with other defenses not necessary to be stated, that the destruction of the cotton was without negligence or carelessness upon the part of the receivers; that it was not then in the custody or under the control of the receivers, but was in the custody and under the control of the Mississippi Valley Transportation Company, the owner of the steamboat and barges, and was in transit by said company's line, and claimed exemption under the conditions in the bill of lading referred to. On the 1st day of November, 1894, the court below decreed in favor of the petitioners that the receivers of the railway company pay to the Insurance Company of North America the sum of \$47,468.30, the value of the cotton destroyed; from which decree this appeal is taken.

John M. Butler, for appellants.

John F. Lewis, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

We do not find it needful to determine the disputed question of fact whether the sums paid to the shippers by the agent of the railway company were in rebate of freight, or in consideration of the assumption by the shippers of the marine risk between Memphis and Cairo, nor to say whether the receipts given by the shippers upon such payments were altered after delivery, or were procured by fraudulent means, since our judgment must proceed upon other facts which are undisputed, or abundantly established by the evidence. Nor do we need to consider the interesting question discussed at the bar, whether, under the act of March 27, 1874, (Rev. St. Ill. 1881, c. 27, § 1) that "whenever any property is received by a common carrier to be transported from one place to another within or without this state, it shall not be lawful for such carrier to limit his common-law liability safely to deliver such property

Immaterial
questions
passed.

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at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property," it was competent for the railway company by contract to relieve itself of its common-law liability. It was urged that this statutory provision is to be read into the charter of the company, and is the law of its existence, that its charter is the same abroad as at home, and that this company carried with it into Tennessee this disability to limit its liability.

We assume for the purpose of this case—without passing any opinion upon the question—that the railway company,

**Delay in trans-
portation—
Liability of
carrier.**

contracting in the state of Tennessee, could thus limit its common-law liability, notwithstanding the statute. Upon the postulate that the railway company could thus relieve itself of the marine risk between Memphis and Cairo, and upon the further postulate that that risk was assumed for a consideration by the shippers, the cotton was received by the railway company at Memphis, and shipped by river under a through bill of lading for transportation to Clinton, in the state of Massachusetts, over the line of the railway company and its connections, subject to the condition contained in the bill of lading that the railway company and forwarding lines connected therewith should not be liable for loss or damage by fire or other casualty, while in transit, or while in depots or other places of transshipment, or at depots or landings at points of delivery, nor for loss or damage by fire, collision, or the dangers of navigation, while on the seas, rivers, lakes, or canals. The cotton was, as to its shippers and owners, delivered into the possession of the railway company at Memphis, which employed the River Transportation Company to take it from Memphis and deliver it to the railway company at North Cairo; but it was so in its possession subject to the assumption of the marine risk by the shippers and owners. It arrived at Cairo at midnight between the 10th and 11th days of December, and was not delivered at North Cairo because the agents of the railway company directed its detention at Cairo.

We are satisfied that its enforced delay there for 17 days was caused, not by the ice in the river, but by the railway company for its own purposes. It is unnecessary to review the evidence. It is sufficient to say that the testimony establishes to our satisfaction that there was a glut of freight

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beyond the capacity of the railway company to handle with ordinary dispatch, that the railway company at Memphis contracted to carry this cotton during the period of and with knowledge of its inability to handle it with proper dispatch, and that the detention from the 11th to the 28th of December must be attributed as a fault to the railway company. This conclusion is supported by the fact that, during such detention, the railway company agreed with the River Transportation Company to a stipulated demurrage for the detention of the barges after 48 hours from their arrival, thus recognizing that the delay was for its convenience and for its own purposes. This delay, however, was not of itself a proximate cause of the destruction of the cotton by fire. The loss would have occurred if the barge had arrived at Cairo on the evening of the 28th of December, immediately prior to the fire, and had been moored at the place it occupied. The negligent delay was, standing alone, a remote, and not a proximate, cause, remotely contributing to the injury as an occasion or condition. *Railway Company v. Reeves*, 10 Wall. 176; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 233; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; *Morrison v. Davis*, 20 Pa. St. 171; *Goodlander Mill Co. v. Standard Oil Co.*, 24 U. S. App. 7, 11 C. C. A. 253. So that if the negligent delay was the only fault attributable to the company, it may be doubted whether, under the conditions of the bill of lading limiting liability, there could be a recovery, because such delay did not of itself produce the loss, there being no casual connection between the negligent act and the injury.

For reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss occasioned by its own negligence. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 322; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 37 Am. & Eng. R. Cas. 681, *California Ins. Co. v. Union Express Co.*, 133 U. S. 387, *Constable v. National Steamship Co.*, 154 U. S. 51. Limiting Liability.

The question, therefore, is presented whether the railway company, in connection with or independently of its negligent delay, was guilty of any act of negligence which may be deemed an active, efficient, and availing cause of the destruc-

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tion of this cotton. For, although the immediate cause of the loss was doubtless fire from the sparks from a passing steamer, yet if the negligence of the railway company concurred or mingled with the immediate cause as an active and sufficiently proximate cause of the loss, the carrier is not absolved from responsibility, notwithstanding the stipulated exemption. And this is so, we take it, because the shipper stipulated the exemption from liability upon the part of the carrier with respect to dangers attending the property in the usual course of its carriage. They agreed to exempt the carrier from liability for loss or injury by fire or other casualty while the property was in transit, or while in depots or other places of transshipment, or at depots or landings at points of delivery, and from marine risks while on the seas, rivers, lakes, or canals. The exemption contemplates a continuous carriage according to the usual course of business, and the dangers incident to such carriage. It, doubtless, comprehended such usual delays as attended transportation in the ordinary dispatch of business. It may be doubted if the exemption included dangers incident to suspended transportation at the mere election of the carrier. It certainly did not contemplate that the carrier, during such suspended transportation, might negligently expose the cotton to dangers that ordinary forecast should have guarded against. In case of delay by the carrier, he is bound to protect the property in his charge from unreasonable hazards. He is bound to guard it from dangers which ought reasonably to be apprehended. If he fails therein, and especially if he unnecessarily exposes property to apprehended danger, he is liable, notwithstanding the exemption of the bill of lading, and although his act may not be the immediate cause, but the concurring cause, of the loss.

There is no certain agreement in the cases in respect to the ground upon which the rule is based. Some assert the negligent act of exposure to be a proximate or concurring cause of the loss. Others, disregarding any question of remote, concurring, and proximate cause, place the rule upon the ground that the carrier shall not be permitted to avail himself of exemption from liability when his own act has exposed the property unnecessarily to danger that should reasonably have been anticipated. The latter ground seems to us the more logical and comprehensive, avoiding all nice distinction

Same—Stipulation against liability.

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with respect to remote, concurring, or proximate cause. It places liability upon the ground that the character of insurer attaches to the contract of carriage, and that the exemption from liability contracted for is inoperative in case the negligence by the carrier concurs with other causes to produce the loss; or, in other words, that the exemption contracted for was from loss occasioned by the dangers incident to the carriage, and not from those which were brought about by the carrier's negligence, that the latter are not within the intentment of the exemption, and therefore that the carrier stands as insurer under his common-law liability, not discharged, with respect to losses occasioned by his own negligence, by any exemption in the contract of carriage. The rule, however, upon whatever ground it may be placed, is well settled. *Williams v. Grant*, 1 Conn. 487; *Tierney v. Railway Co.*, 76 N. Y. 306; *Tanner v. Railroad Co.*, 108 N. Y. 623, 32 Am. & Eng. R. Cas. 380; *Scott v. Hunter*, 46 Pa. St. 195; *Derry v. Flitner*, 118 Mass. 133; *McGrew v. Stone*, 53 Pa. St. 436; *Canal Co. v. Tiers*, 24 N. J. L. 697; *McGraw v. Railroad Co.*, 18 W. Va. 361; *Wolf v. American Express Co.*, 43 Mo. 421; *Hewett v. Railway Co.*, 63 Iowa 612, 18 Am. & Eng. R. Cas. 568; *Fent v. Railroad Co.*, 59 Ill. 349; *Railroad Co. v. Hoag*, 90 Ill. 339.

We find no difficulty in reaching the conclusion that the railway company, during the period of negligent delay, wrongfully and negligently exposed this cotton to danger.

The Ohio river, at Cairo, was the seat of an active commerce. The cotton should have been delivered **Facts showing negligence.**

to and received by the railway company at North Cairo, a place for the exclusive delivery of freight consigned to the railway company. By direction of the company the barge containing this cotton was detained at Cairo, a mile or two below the place of delivery, at the foot of the levee at Tenth street. This was a public landing, at the foot of a steep bank. At the top of the bank are laid the tracks of the Illinois Central Railroad, over which there is a constant passage of trains. There was at this time an unusual number of vessels at this levee, where at all times a greater number of vessels are moored than at any other point at Cairo. The main channel of the Ohio river is at this point closer to the shore than at any point other in the vicinity, so that passing steamers here come closer to the shipping than at other points,

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and especially so than at North Cairo, where the barge should properly have been moored. The congestion of shipping at this levee had the effect to place the barge further out in the river than ordinarily would have been the case, and so closer to passing steamers. The prevailing winds at this season of the year are from the south. This being the condition of things, the barge was knowingly placed in the most exposed situation possible at Cairo. If it was designed to expose this property to destruction, no better place for that purpose could have been selected. On the one side it was exposed to sparks from passing trains upon the Illinois Central Railroad. Upon the other it was exposed to sparks from passing steamers, which here come closer to the shore than at any other point upon the river at that place. By reason of the congestion of the shipping there, this barge and its attendant steamer were moored far out in the river, and quite close to the channel, thus subjecting them to greater danger from sparks from the numerous passing steamers. This cotton, as is well known, is a highly inflammable material. The railway company refrain from handling it in the night time, to avoid exposing it to the possible danger to fire from torch or lantern. As one of the witnesses for the railway company expresses it, "It is liable to take fire almost like tinder."

The railway company was bound to deal with this property with a care proportionate to the risk. Being inflammable, the cargo should be zealously guarded against exposure to fire. Here the barge was moored, not at the proper place, but in a place where it would be most exposed to danger, and to the very danger by which its destruction was accomplished, and which the most ordinary circumspection should have apprehended. And this was done, not out of necessity, arising in the transit of the cotton, but for the accommodation of the company during the period of its negligent delay in transit. We cannot but think, under the circumstances here disclosed, that this property was negligently exposed by the railway company, and that it cannot, therefore, avail itself of the exemptions of the bill of lading, because such dangers were not within the contemplation of the stipulated exemptions.

The decree will be affirmed.

WOODS, Circuit Judge, sat upon the hearing of this cause, but, for personal reasons, occurring subsequently to the hearing, did not participate in the decision.

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J. J. DOUGLAS CO.

v.

MINNESOTA TRANSFER RAILWAY CO.

(*Supreme Court of Minnesota, Oct. 30, 1895.*)

Carriers of Merchandise [(1) p. 565]—**Limiting Liability** [(1) p. 677]—**Construction of Contract in Question.**—Five barrels of whisky were delivered for transportation to a common carrier, accompanied by a written statement of the shipper that the value of the property was \$20 per barrel, and also, as one of the conditions upon which the property should be transported, that: "The amount of loss or damage for which any carrier becomes liable shall be computed at the value of the property as to time and place of shipment under the bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation." The carrier executed, and the shipper accepted, a bill of lading in accordance with these terms, in which the value of the goods was stated to be \$20 per barrel, and classifying them as second-class freight, and fixing the rate of freight at \$2.72 per 100 pounds. The bill of lading also contained a stipulation that "in consideration of rates inserted, it is agreed that, in case of loss or damage, the same shall be adjusted at the agreed valuation of \$20 per barrel." If the valuation of the goods had been at their full actual value, they would have been classified as first-class freight, and the rate of freight would have been \$3.45 per 100 pounds. The shipper fixed and agreed to such valuation, in order to obtain, and he did thereby obtain, the lower rate of freight, the charge for transportation being based on such valuation. The goods were lost by the negligence of the carrier. *Held*, in an action for such loss, that the stipulation that such loss should be adjusted at the agreed valuation of \$20 per barrel was valid, and that the recovery by the shipper is limited to the value named. *Alair v. Railway Co.*, 53 Minn. 160, *followed*. (Page 675).

APPEAL from Hennepin county district court. *Affirmed.*

Merrick & Merrick, for appellant.

W. H. Norris, for respondent.

MITCHELL, J.—The matter in dispute between these parties was submitted to the district court, without action, upon an agreed state of facts. Gen. Stat., 1894, § 6083. The only facts material on this appeal are the following: The Ohio & Mississippi Railway Company is a common carrier operating a line of railway from Louisville, Ky., to East St. Louis, Ill., where it makes connection with

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another like carrier operating a line of railway from East St. Louis to Chicago, where it makes a like connection with a third like carrier operating a line of railway from Chicago to St. Paul, where it makes a like connection with the transfer tracks of the defendant, the Minnesota Transfer Railway Company, a like carrier, which connects with the railways of both the Northern Pacific Railway Company and the Great Northern Railway Company, like carriers, each of which operates a line of railway from St. Paul to Butte, Mont.; the transfer of freight from railroads running into St. Paul from the south and east to the railroads running from St. Paul to the west and north being made by the defendant, over its system of transfer tracks. In October, 1892, at Louisville, Ky., the plaintiff delivered to the first-named railway company (the Ohio & Mississippi) 5 barrels of whiskey, weighing 1980 pounds, now admitted to have been of the actual value of \$443.89. The property was so delivered to be transported by the Ohio & Mississippi Railway Company and its connecting lines from Louisville to Butte, being consigned to one Cohen, at the latter place.

The delivery of the property to the Ohio & Mississippi Railway Company was accompanied by the following paper, prepared, executed, and presented by the plaintiff itself:

“Received of J. J. Douglas Co. the following described packages (contents unknown) in store at his risk, to be forwarded by the Ohio & Mississippi Railway Company, subject to all the conditions (as printed on the back of this sheet) of a bill of lading which will be issued by said company after the same shall have been loaded into the cars of said company.

“ARTICLES.

“Weight (subject to correction).

“Alex. Cohen, Butte, Mon.

“Via Great Northern Railroad.

“Five bls. whiskey O. R. L. 20 Val.”

Among the conditions referred to as printed on the back of this paper was the following:

“The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the time and place of shipment under this bill of lading, unless a lower value has been agreed upon or is deter-

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mined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation."

The Ohio & Mississippi Railway then executed and delivered to the plaintiff a bill of lading in accordance with the terms and conditions proposed by the plaintiff in which the railway company agreed to carry the property to its destination if on its own road; otherwise, to deliver it to another carrier on the route to such destination. It further provided that the rate of freight from Louisville to Butte should be \$2.72 per 100 pounds, the goods being classed as second-class freight. It also showed that the goods were consigned via the Great Northern Railway, and stated the value of the goods at \$20 per barrel, the same given by the plaintiff in the paper already referred to.

Facts continued.

The bill of lading contained the following provisions: "It is mutually agreed, in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions herein contained, and which are hereby agreed to by the shipper, and by him accepted for himself and assigns as just and reasonable." Also: "In consideration of rates inserted, it is agreed that, in case of loss or damage, the same shall be adjusted at the agreed valuation of twenty dollars per barrel."

The same conditions were printed on the back of this bill of lading as upon the paper previously referred to, as prepared, executed, and presented by the plaintiff upon delivery of property. "This bill of lading was not contrary to the law of Kentucky." "If said bill of lading had not contained the provision, 'In consideration of rates inserted, it is agreed that, in case of loss or damage, the same shall be adjusted at agreed valuation of \$20 per barrel,' and if said whiskey had been shipped without any valuation, the same would have been rated as first-class, and the freight thereon from Louisville aforesaid to Butte aforesaid would have been \$3.45 per hundred pounds." "Said J. J. Douglas Company then was and long had been a frequent and heavy shipper of such goods over said lines of railway, well knew and intended to avail itself of such valuation and agreement as to

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valuation, in order to obtain, and so obtained, the shipment thereof at such lower rate of freight, at \$2.72 per one hundred pounds."

The property, accompanied by a waybill setting forth that the shipment from St. Paul to Butte should be over the Great Northern Railway Company, and that the same was of value of \$20 per barrel, was transported by the Ohio & Mississippi Railway Company and its connecting carriers from Louisville to St. Paul, and there delivered to the defendant, which in due time shipped the same for Butte over the Northern Pacific Railway Company instead of the Great Northern Railway Company, as directed.

While the goods were still in transit over the Northern Pacific Railroad, the plaintiff, having discovered the insolvency of the consignee, and having a right for that reason to stop the goods in transit, but being ignorant of the misshipment over the Northern Pacific Railroad, directed the Ohio & Mississippi Railway Company to stop delivery thereof, and to hold the same subject to their order. The Ohio & Mississippi Railway Company, being also ignorant of the misshipment, immediately communicated these orders to its next succeeding carrier, who, being likewise ignorant of the error in shipment, transmitted the orders to the agent of the Great Northern Railway Company at Butte. If the goods had been shipped, as plaintiff directed, over the Great Northern Railroad, the order would have been seasonable to prevent their delivery to the consignee; but the Northern Pacific Railway Company, being ignorant of any such order, delivered the goods to the consignee, who appropriated the same, and he never paid for them, and, as he was wholly insolvent, the plaintiff has wholly lost the property.

The questions submitted to the court upon this state of facts, so far as here material, were: (1) For such shipment over the Northern Pacific Railroad, instead of the Great Northern Railway, is the defendant liable in any sum? (2) If liable, is it liable for the whole actual value of the property, or only to the extent of \$20 per barrel?

The court below held that the defendant was liable to the extent of \$20 per barrel, and no more. As the defendant did not appeal, the first question is not before us for considera-

Facts continued.

Questions submitted.

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tion, except so far as it may be involved in the determination of the second.

We have so recently considered this subject at considerable length in *Alair v. Railway Co.*, 53 Minn. 160, that it does not require any extended discussion at this time. That case and the present cannot, in our judgment, be distinguished on principle. The value stipulated was one named by the shippers themselves for the very purpose of securing a lower rate of freight; and in consideration of securing that reduced rate, and without any sort of coercion or any unfair advantage being exercised over them by the carrier, they expressly agreed that, in case of loss or damage, the same should be adjusted at the agreed valuation of \$20 per barrel; in other words, that such valuation should be that whereon the rate of compensation to the carriers for their services as well as their risks connected with the property should be based. That being the case, the contract ought to be upheld as a just and reasonable mode of securing a due proportion between the amount for which the carriers might be responsible and the freight which they were to receive. If this purpose was a reasonable and fair one, the mere fact that the contract might incidentally have the effect of reducing the amount of the carrier's liability in case of loss caused by negligence will not render it invalid. If the plaintiff desired to obtain the carrier's unlimited common-law liability, all it had to do was to ship the goods as first class, and pay or agree to pay the higher rate of freight. It would be manifestly unjust, after a shipper has secured a reduced rate of freight by stipulating to a valuation of the property as the basis of fixing the carrier's compensation and responsibility, to allow him to repudiate his contract. It would require some very weighty considerations of public policy to justify permitting him to do so.

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bility.

The only difference that is suggested between the *Alair* case and the present one is that in the former it did not appear that the carrier had any reason to suppose that the stipulated value of the property was not its actual value, while in this case it is claimed the carrier must have known that the goods were worth more than \$20 per barrel. The agreed facts do not state that the carrier knew that the value of the goods was greater than that fixed on them by the shipper. But it is fair to presume that, if the carrier thought of the matter at

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all, it had good reason to suppose that, if the property was what it purported to be, it was worth more than \$20 per barrel. But we do not think that this, if true, would be at all material, inasmuch as the valuation was one voluntarily fixed and agreed to by the shipper as the basis upon which the carrier's compensation as well as responsibility should be determined and adjusted.

In some respects the facts in this case are even stronger in favor of the defendant than in the *Alair* case, although, perhaps, not affecting the rule of law applicable. In the present case it affirmatively appears that the valuation was one placed on the property by the shipper himself, for the purpose of securing cheaper freight; that he did thereby secure a lower rate, and, in consideration of that fact, expressly contracted that, in case of loss or damage, the same should be adjusted on the basis of that valuation. There is no suggestion of any coercion or unfair dealing on the part of the carrier which received the freight; neither is there any suggestion of fraud or wilful wrong on the part of this defendant in shipping the goods over the Northern Pacific Railway. So far as appears it was simply a mistake.

There is no force in the suggestion that the terms of the contract would be applicable only where the loss or damage occurred while the goods were in transit over the route designated by the shipper, and not to loss or damage caused by a violation of the contract in forwarding them over some other route.

As the authorities were quite fully cited and discussed by us in the *Alair* case, it is unnecessary to again refer to them. We will simply suggest that *Hart v. Railroad Co.*, 112 U. S. 331, 18 Am. & Eng. R. Cas. 604, was decided over 11 years ago. It has never been overruled or modified, but, on the contrary, has been recently cited approvingly and its doctrine applied in *Primrose v. Telegraph Co.*, 154 U. S. 1. It may therefore be considered as the settled doctrine of the federal courts. The desirableness of being in harmony, if possible, with those courts on a question of this kind must be apparent. But, aside from any such consideration, we see no reason why the doctrine of the *Alair* case should not be adhered to.

We have not considered the effect of the agreed fact that the terms of the bill of lading were not contrary to the law

of Kentucky, where the contract was made, as we preferred to decide the case on broader grounds.

Order affirmed.

CANTY, J.—I concur in the foregoing opinion, but am of the opinion that the rule of law laid down in this and the Alair case should be watched closely, as in practice it is liable to lead to evasion and abuse on the part of the common carrier.

ABSTRACTS OF RECENT DECISIONS

(1) **Right of Carriers to Limit Liability** [(1) p. 678]—**Power of Carrier to Stipulate against Liability for Loss from Negligence** [(2) p. 682].—A carrier cannot validly stipulate for immunity for liability for loss resulting from his negligence. *Central Trust Co. v. East Tennessee, V. & G. R. Co.*, (U. S. Dist. Ct. E. D. Tenn., N. D.) 70 Fed. Rep. 763, *citing* *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U.S.) 357; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320, 45 Am. & Eng. R. Cas. 312; *Louisville & N. R. Co. v. Sowell*, 90 Tenn. 19, 49 Am. & Eng. R. Cas. 166; *Transportation Co. v. Bloch*, 86 Tenn. 392, 35 Am. & Eng. R. Cas. 579; *Inman v. South Carolina R. Co.*, 129 U. S. 128, 37 Am. & Eng. R. Cas. 663; *The Edward I. Morrison*, 153 U. S. 211.

Same—Special Contract of Carriage—Burden of Proof on Carrier.—If the acceptance of goods for transportation by a common carrier be special, the burden of proof in case of loss is upon him to show, not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care. *Shea v. Minneapolis & S. Ste. M. R. Co.*, (Minn.) 65 N. W. Rep. 458, *citing* *Shriver v. Railroad Co.*, 24 Minn. 506; *Lindsley v. Railway Co.*, 36 Minn. 539, 31 Am. & Eng. R. Cas. 86; *Hull v. Railway Co.*, 41 Minn. 510, 40 Am. & Eng. R. Cas. 104; *Boehl v. Railway Co.*, 44 Minn. 191, 45 Am. & Eng. R. Cas. 351.

Same—Exemption Against Loss by Fire [(1a) p. 680]—**Burden of Proof on Carrier to show Loss Not Caused by its Negligence.**—Where the carriage contract exempts the carrier from liability for loss by fire, to enable it to claim such exemption the burden of proof is on it to show that the fire was not caused by its negligence. *Southard v. Minneapolis, St. P. & S. Ste. M. R. Co.*, (Minn.) 62 N. W. Rep. 619. On application for reargument for original opinion see *Same v. Same*, 61 Am. & Eng. R. Cas. 282.

Same—Same—Injury to Shipment by Fire [(1a) p. 680]—**Liability of Company.**—A car loaded with binding twine and rope was run into a freight yard about 9 o'clock in the evening for unloading in the morning, and about 3 o'clock the next morning, fire from a warehouse on property other than that of the defendant and about 23

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feet distant from the car and across an alley outside the freight yard, communicated to the contents of the car, possibly through an opening of about ten inches where the car door had been left open, and damaged the contents; the employes about 20 minutes after the commencement of the fire moving the car out of further danger and extinguished the fire. *Held*, that the company was not guilty of negligence, and was relieved from liability by a stipulation in the bill of lading that "No carrier, or party in possession of all or any part of the property herein described, shall be liable for any loss thereon or damage thereto, by causes beyond its control, * * * or by fire, from any cause whatsoever occurring." *Scott v. Allegheny Valley R. Co.*, (Pa.) 33 Atl. Rep. 812.

Same—*Liability of Express Company* [(2a) p. 682]—*Liability for Loss by Embezzlement of its Employee*.—Where by the fraud of the agent of an express company a bank is induced to transmit money by the express company and the money while in possession of the company is embezzled by the agent, the company is responsible to the bank for the loss. *Southern Express Co. v. Bank of Tupelo*, (Ala.) 18 So. Rep. 664.

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(1) p. 677] **Right of Common Carrier to Limit Liability—How Far Liability may be Limited—Essentials of Contract**.—To what extent is a common carrier entitled to contract in limitation of his common-law liability?

This is a question, in so far as it applies to carriers by land, upon which there has been great contrariety of opinion in different courts, the earlier cases holding that it was against public policy, and hence impossible, for common carriers to guard themselves by any stipulations whatever against liability from loss arising from any other cause than the act of God or the public enemy. While the later cases have materially modified this rule in the carrier's favor, and permitted him not only to contract so as to change the extent of his liability as fixed by the common law, but such contracts, when made with his employer, became almost entirely the measure of his responsibility. And this custom has become so universal in transactions with carriers that his liability may now be said to depend almost exclusively upon contract. He still stands, however, in the relation of common carrier to the goods intrusted to him, notwithstanding his contract, however much it may lessen his common-law liability, and he cannot, even by the most express contract, divest himself of that character, and change it to that of a mere private carrier or ordinary bailee. *Davidson v. Graham*, 2 Ohio St. 131; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; *Christenson v. American Exp. Co.*, 15 Minn. 270; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, 180; *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369. *But see*

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American Exp. Co. v. Sands, 55 Pa. St. 140; *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523, 30 Am. & Eng. R. Cas. 9.

Whether and to what extent a common carrier may, by contract, limit his common-law liability, is as, stated above, a question upon which the authorities are conflicting; but it seems to be the decided weight of authority, and is much the better reason, that a common carrier may, to a great extent at least, contract in limitation of his common-law liability, provided the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy. *Ballou v. Earle*, 17 R. I. 441, 48 Am. & Eng. R. Cas. 31. *Southern Exp. Co. v. Caldwell*, 21 Wall, (U. S.) 264.

A common carrier may, by special contract, limit its liability for loss of goods to an amount agreed on as to the value in consideration of a reduced rate of freight, provided no extortion or coercion is practiced, and therefore no undue advantage taken of the shipper; but such special contract does not protect the carrier against liability for fraud, nor for intentional, wanton, or reckless negligence. *Louisville & Nashville R. Co. v. Sherrod*, 84 Ala. 178, 35 Am. & Eng. R. Cas. 611.

But it is said that a carrier cannot, by special contract, limit its common-law liability for losses not occasioned by its negligence where the shipper has not been afforded an opportunity to contract for the service required without such restriction, even though he makes the special contract without objection or a demand for a different one, if he knew that the carriers' agent had no authority to make any other contract with him. *Little Rock & F. S. R. Co. v. Cravens*, 57 Ark. 112, 55 Am. & Eng. R. Cas. 650.

The reasoning which upholds this line of decision is well stated by the court as follows: There are principles of law pertinent to common carriers that are well settled, among which may be stated the following: That a carrier is bound to receive and carry all articles tendered him of the kind that he engages in carrying; that in performing that service the law casts upon him the accountability of an insurer, unless he undertakes the service in the particular case under a special contract with the shipper restricting his liability; that the carrier can by no act of his own modify his liability, but that every modification must arise out of a contract fairly made, and be just and reasonable in its terms. It follows from the principles stated that the law deems it just and reasonable to hold the carrier to the duty of carrying with the accountability of an insurer, if the shipper so wish, so that the carrier can neither decline to perform the service nor, of his own motion, escape that extreme accountability. He is authorized to contract with the shipper for a restricted liability, but such restriction depends upon the consent of the shipper. He has the right of choice between the common-law undertaking and any special contract that the carrier may wish to make, and the making of a modified contract must represent his choice. But, although his consent is an indispensable element in such contract, it is not conclusive of its validity; for the law will permit the carrier to be released from his common-law liability, not upon every contract to that effect that would be valid if it related to other matters, but only in pursuance of a contract fairly made, the terms of which are deemed just and

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reasonable. So that, while a carrier claiming an exemption must show a contract providing for it, even this will not avail him if it appear to be unfair, unjust, or unreasonable. Whether the agreement relied upon in a particular case satisfies the requirement of the law, as regards its terms and the manner of its procurement, must be determined in view of the rights and duties of the parties, the policy of the law defining them, and the tendency of the contract to conserve or to violate such policy. If an intending shipper should be refused transportation because he would not make a special contract, he might desist from shipping and hold the carrier for damages. Of this there can be no doubt. If it were otherwise, the carrier could refuse to perform a service the performance of which is its primary duty, and justify upon the ground that its intending customer declined to release him from liability, which the wisdom of the law imposes on him; and, while the law will not permit him to restrict his liability, it would thus recognize a restriction due to what, viewed practically, was no less than his compulsion. This, in effect, would authorize him to abrogate a rule of law designed to hold him to a discharge of his duties; and the law does no such foolish thing as to prescribe regulations and vest the party to be regulated with the right to repeal them.

A railroad company, as a common carrier, may, upon sufficient consideration, stipulate against liability for loss except such as may grow out of its own negligence or bad faith; and a lower rate of freight for through transportation beyond the terminus of its road, not conceded except upon such terms, is a sufficient consideration. *Dillard Bros. v. Louisville & N. R. Co.*, 2 Lea (Tenn.) 288.

(1a) Common carriers have the right to limit their common-law liability by express contract, and the fire-exemption clause in such contracts is recognized as valid throughout the United States. *Taylor v. Little Rock, M. R. & T. R. Co.*, 32 Ark. 393; *Little Rock & Ft. S. R. Co. v. Hall*, 32 Ark. 670; *Taylor v. Little Rock, M. R. & T. R. Co.*, 39 Ark. 148, 18 Am. & Eng. R. Cas. 590; *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 Ark. 529, 18 Am. & Eng. R. Cas. 598; *Little Rock, M. R. & T. R. Co. v. Corcoran*, 40 Ark. 375, 18 Am. & Eng. R. Cas. 602; *Little Rock, M. R. & T. R. Co. v. Harper*, 44 Ark. 209, 21 Am. & Eng. R. Cas. 97; *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 243; *Little Rock, M. R. & T. R. Co. v. Talbot*, 47 Ark. 103; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 412, 35 Am. & Eng. R. Cas. 635; *St. Louis, I. M. & S. R. Co. v. Bone*, 52 Ark. 26; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Evansville & C. R. Co. v. Androscoggin Mills*, 22 Wall. (U. S.) 594; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318; *Southern Exp. Co. v. Caldwell*, 21 Wall. (U. S.) 267; *U. S. Exp. Co. v. Kountze*, 8 Wall. (U. S.) 342; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Hart v. Pennsylvania R. Co.*, 112 U. S. 337, 18 Am. & Eng. R. Cas. 604; *Whitworth v. Erie R. Co.*, 87 N. Y. 413, 6 Am. & Eng. R. Cas. 351, *Whitehead v. Wilmington & W. R. Co.*, 87 N. Car. 255, 9 Am. & Eng. R. Cas. 174.

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A contract exempting a common carrier from liability for loss by fire, not due to his negligence, is valid when, being free from other exception, it is supported by a sufficient consideration, and the shipper is afforded an opportunity to choose between the limited liability and the common-law responsibility of the carrier. *Railway Co. v. Manchester Mills*, 88 Tenn. 653; *citing Dillard Bros. v. Louisville & N. R. Co.*, 2 Lea (Tenn.) 288; *Railroad Co. v. Gilbert Parkes Co.*, 88 Tenn. 430, 42 Am. & Eng. R. Cas. 372.

A contract will not be construed as exempting a common carrier from liability for negligence, unless such exemption is expressed in unequivocal terms. Every presumption is against such an intention. *Stineweg v. Erie R. Co.*, 43 N. Y. 123; *Holsapple v. Rome, Watertown & O. R. Co.*, 86 N. Y. 275, 3 Am. & Eng. R. Cas. 487.

Hence the common-law liability of a common carrier cannot be restricted by notice even when such notice is brought home to the knowledge of the owner. The express assent of the owner to such restriction must be proved in order to give effect to it. *Western Transp. Co. v. Newhall*, 24 Ill. 466, *citing Moses v. Boston & Maine R. Co.*, 24 N. H. 84; *Farmers' & M. Bank v. Champlain*, 23 Vt. 206; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485.

But, in the absence of fraud, concealment, or improper practice, the legal presumption is that stipulations limiting the common-law liability of common carriers contained in a receipt given by them for freight, were known and assented to by the party receiving it. *Belger v. Dinsmore*, 51 N. Y. 166; *Steers v. Liverpool, N. Y. & P. S. S. Co.*, 57 N. Y. 1; *Harris v. Great Western R. Co.*, L. R. 1 Q. B. Div. 515; *Germania F. Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90; *Quimby v. Boston & M. R. Co.*, 150 Mass. 365, 40 Am. & Eng. R. Cas. 693; *Burke v. South Eastern R. Co.*, L. R. 5 C. P. Div. 1; *Maghee v. Camden & A. R. Transp. Co.*, 45 N. Y. 514; *Grace v. Adams*, 100 Mass. 505; *Monitor Mut. F. Ins. Co. v. Buffum*, 115 Mass. 343; *Hill v. Syracuse, B. & N. Y. R. Co.*, 73 N. Y. 351.

In England, however, it seems settled that a common carrier may limit its responsibility by notices brought home to the knowledge of its customers. *Nicholson v. William*, 5 East 513; *Gibbon v. Paynton*, 4 Burr. 2301; *Yates, J., and Aston, J., Evans v. Soule*, 2 M. & S. 1; *Latham v. Ratley*, 2 L. & C. 20; *Harry v. Packwood*, 2 Taunt. 264; *Leeson v. Holt*, 1 Starkie 186; *Mawig v. Todd*, *Ib.* 72; *Lowe v. Booth*, 13 Price 329; *Riley v. Horne*, 5 Bingh. 217; *Brooke v. Pickwick*, 4 Bingh. 218.

And this doctrine prevails to some extent in America. *Gordon v. Little*, 8 S. & R. (Pa.) 533, *Atwood v. Reliance Transp. Co.*, 9 Watts (Pa.) 87; *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 115, *Nelson, J.*; *Phillips v. Eale*, 8 Pick. (Mass.) 182; *Bean v. Green*, 12 Me. 422.

A common carrier cannot contract for absolute exemption for its own negligence. *Moulton v. St. Paul, M. & M. R. Co.*, 31 Minn. 85, 12 Am. & Eng. R. Cas. 13.

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Nor can a common carrier arbitrarily limit its common-law liability for negligence by inserting a clause in a contract limiting recovery to a certain sum. *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Grand Trunk R. Co. of Canada v. Stevens*, 95 U. S. 655; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *U. S. Exp. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transp. Co.*, 55 Wis. 319.

(2) p. 677.]—**Right of Carriers to Limit Liability for Negligence of Selves or Servants and Agents—Conflicting Rules—*Doctrine that such Limitation Cannot be Made.***—It is settled by the decisions of the supreme court of the United States, and of many of the state courts, that a common carrier of persons or property cannot, by an agreement, however plain and explicit, wholly relieve itself from responding in damages to the party injured, when such injury is the result of the gross negligence or fraud of the carrier, its agents or servants. This rule is by most of the courts founded upon public policy, and by some upon both public policy and a want of consideration to support such agreement. *Black v. Goodrich Trans. Co.*, 55 Wis. 319, *citing* *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How (U. S.) 344; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Canbee v. Western Union Tel. Co.*, 34 Wis. 471; *Hibbard v. Telegraph Co.*, 33 Wis. 558; *Morrison v. Construction Co.*, 44 Wis. 405; *Moulton v. St. Paul, M. & M. R. Co.*, 31 Minn. 85, 12 Am. & Eng. R. Cas. 13. See also *New Jersey Steam Nav. Co. v. Merchants' Bank of Boston*, 6 How. (U. S.) 344; *York Mfg. Co. v. Illinois Cent. R. Co.*, 3 Wall. (U. S.) 107; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Southern Exp. Co. v. Caldwell*, 88 U. S. 264; *Ogdensburgh & L. C. R. Co. v. Pratt*, 21 Wall (U. S.) 123; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655.

The foundation of the rule of public policy that a carrier shall not exempt itself by a contract with the owner of goods from liability for its own negligence, is that such a contract tends to relax that diligence in the performance of its duties as a public carrier which the law exacts. *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

In several of the states it is held that the law preventing a carrier from limiting his liability for his own negligence by means of any contract is too well settled to permit of modification. *Moulton v. St. Paul, M. & M. R. Co.*, 31 Minn. 35, 12 Am. & Eng. R. Cas. 13; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645, 16 Am. & Eng. R. Cas. 158; *McCune v. Burlington, C. R. & N. R. Co.*, 52 Iowa 600; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105; *United States Exp. Co. v. Bateman*, 28 Ohio St. 144. See also *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474; *Illinois Cent. R. Co. v. Read*, 37 Ill. 485; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; *Boscowitz v. Adams Exp. Co.*, 93 Ill. 532.

(2a). An express company cannot limit its liability for loss of goods

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occasioned by its own negligence. *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523, 30 Am. & Eng. R. Cas. 9; *Brown v. Adams Exp. Co.*, 15 W. Va. 812; *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180, 191, *Newborn v. Just*, 2 Car. & P. 76; *New Jersey Steam Nav. Co. v. Merchants' Bank of Boston*, 6 How. (U. S.) 344; *Snider v. Adams Exp. Co.*, 63 Mo. 376, 383; *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243; *Western Transp. Co. v. Newhall*, 24 Ill. 466; *Graham v. Davis*, 4 Ohio St. 362; *Muser v. American Exp. Co.*, 1 Fed. Rep. 382; *Southern Exp. Co. v. Seide*, 67 Miss. 609, 42 Am. & Eng. R. Cas. 398.

Reasonable limitations upon the responsibility of a common carrier may, however, be imposed by contract; but a carrier cannot, by contract with the owner of goods intrusted to it for shipment, exempt itself from liability for its own negligence, and in cases of loss the presumption is against the carrier. *Inman v. South Carolina R. Co.*, 129 U. S. 128, 37 Am. & Eng. R. Cas. 663.

A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law, and it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or servants. These rules apply to both common carriers of goods and common carriers of passengers. *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

The Ohio cases are very decided on this subject, and reject all attempts of the carrier to excuse his own negligence or that of his servants. *Jones v. Voorhees*, 10 Ohio 145; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Ohio St. 362; *Wilson v. Hamilton*, 4 Ohio St. 722; *Welsh v. Pittsburgh, Ft. W. & C. R. R. Co.*, 10 Ohio St. 75; *Cleveland R. R. Co. v. Curran*, 19 Ohio St. 1; *Cincinnati, etc., R. R. Co. v. Pontius*, 19 Ohio St. 221; *Knowlton v. Erie R. R. Co.*, 19 Ohio St. 260.

In Pennsylvania it is settled by a long course of decisions, that a common carrier cannot, by notice or special contract, limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents. *Laing v. Colder*, 8 Pa. St. 479; *Camden & A. R. Co. v. Baldauf*, 16 Pa. St. 67; *Goldey v. Pennsylvania R. Co.*, 30 Pa. St. 242; *Powell v. Same*, 32 Pa. St. 414; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Farnham v. Camden & A. R. Co.*, 55 Pa. St. 53; *American Exp. Co. v. Sands*, 55 Pa. St. 140; *Empire Transp. Co. v. Wamsutta Oil Co.*, 63 Pa. St. 14.

To the same purport, likewise, are many other decisions of the state courts. *Indianapolis, P. & C. R. Co. v. Allen*, 31 Ind. 394; *Michigan S. & N. I. R. v. Heaton*, 31 Ind. 397, n.; *Flinn v. Philadelphia, W. & B. R. Co.*, 1 Houst. (Del.) 472; *Orndorff v. Adams Exp. Co.*, 3 Bush (Ky.) 194; *Swindler v. Hilliard*, 2 Rich. (S. Car.) 286; *Berry v. Cooper*, 28 Ga. 543; *Steele v. Townsend*, 37 Ala. 247; *Southern Exp. Co. v. Crook*, 44 Ala. 468; *Whitesides v. Thurlkill*,

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12 Smed. & M. (Miss.) 599; Southern Exp. Co. v. Moon, 39 Miss. 822; New Orleans Mut. Ins. Co. v. R. R. Co., 20 La. Ann. 302.

Same—*Doctrine that Carrier may Limit Liability for Own Negligence.*—In New York the doctrine was early established that a common carrier may stipulate against responsibility for the negligence of its servants, but to accomplish this object the contract must be clear and specific in its terms and plainly covering each case. Welles v. New York Cent. R. Co., 26 Barb. (N. Y.) 641, *affirmed* in 20 N. Y. 181; Perkins v. New York Cent. R. Co., 24 N. Y. 196; Smith v. New York Cent. R. Co., 29 Barb. (N. Y.) 132, *affirmed* in 24 N. Y. 222; Bissell v. New York Cent. R. Co., 29 Barb. (N. Y.) 602; Poucher v. New York Cent. R. Co., 49 N. Y. 263.

The courts of the State of New York have carried the power of common carriers to limit their liability by special contract to the extent of enabling them to exonerate themselves from the effects of even gross negligence, where the contract expressly provides for such exemption, and where it is founded upon a valuable consideration, such as the abatement in whole or in part of the usual rate of charge. Wills v. New York Cent. R. Co., 24 N. Y. 181; Perkins v. New York Cent. R. Co., 24 N. Y. 96; Wilson v. New York Cent. & H. R. R. Co., 97 N. Y. 87, 21 Am. & Eng. R. Cas. 148; Poucher v. New York Cent. R. Co., 49 N. Y. 263.

Cases may also be found in some of the other state courts, which by dicta or decision either favor or follow more or less closely the decisions in New York. Ashmore v. Pennsylvania S. T. & T. Co., 28 N. J. L. 180; Kinney v. Central R. Co., 32 N. J. L. 407; Hale v. New Jersey St. Nav. Co., 15 Conn. 539; Peck v. Weeks, 34 Conn. 145; Lawrence v. New York R. Co., 36 Conn. 63; Kimball v. Rutland R. Co., 26 Vt. 247; Mann v. Birchard, 40 Vt. 326; Adams Exp. Co. v. Haynes, 42 Ill. 89, *Ib.* 458; Illinois Central R. Co. v. Adams, 42 Ill. 474; Hawkins v. Great Western R. Co., 17 Mich. 57, s. c., 18 *Id.* 427; Baltimore & O. R. Co. v. Brady, 32 Md. 333, 25 Md. 128; Levering v. Union Transp. Co., 42 Mo. 88.

And in England it is well settled that a common carrier may limit its responsibility by a special acceptance. Kenrig v. Eggleston, Alyn 93; Rolles, Ch. J., Southcote's Case, 4 Coke Rep. 84, 84; Coke, Ch. J., Slue v. Morse, 1 Vent. 190, 288; Hale, Ch. J., Lyon v. Mells, 1 Smith 484, s. c., 5 East 428; Abbott on Ship., part 3, ch. 4, sec. 8, p. 296, ed. 1822; Carley v. Wintringham, Peake N. P. Cas. 150; Gibbon v. Paynton, 4 Burr. 2301; Lesson v. Holt, 1 Stark. 186; Harris v. Packwood, 3 Taunt. 271; Wyld v. Pickford, 8 Mees & W. 443; Southcote's Case, 4 Coke 84. And see Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485.

Therefore, since by the law of England a contract of carriage with the owner of goods to limit its liability for the negligence of its servants is valid, an agreement to insure against such negligence would be equally valid. Walker v. Monarch, 5 Barn. & Ald. 171; Waters v. Monarch F. & L. Assur. Co., 5 El. & Bl. 870; London

Penn. Steel Co. v. Ga. R. & B. Co.

Lien for Freight

& N. W. R. Co. v. Glyn, 1 El. & El. 652; North British & M. Ins. Co. v. London, L. & G. Ins. Co., L. R. 5 Ch. Div. 569; Crowley v. Cohen, 3 Barn. & Ad. 478. *See also* DeForest v. Fulton F. Ins. Co., 1 Hall (N. Y.) 84; Savage v. Corn Exchange F. & I. Ins. Co., 36 N. Y. 655; Commonwealth v. Shoe & L. D. F. & M. Ins. Co., 112 Mass. 131; Jackson Co. v. Boylston Mut. Ins. Co., 139 Mass. 508, 21 Am. & Eng. R. Cas. 117.

Same — In General. — In the absence of statutes forbidding the making of contracts prescribing the time after which a fixed liability, incurred by a common carrier, shall not be enforced by suit, the only limitation of the validity of such a contract when made on sufficient consideration is that it be reasonable as to the period of time stipulated. Gulf, Colo. & S. F. R. Co. v. Trawick, 68 Tex. 314, 30 Am. & Eng. R. Cas. 49.

Where a contract is made with a common carrier for the transportation of goods, no intermediate carriers being designated, and containing no provisions that its stipulations shall inure to the benefit of all the carriers, an intermediate carrier, by accepting of goods for transportation, is bound by the ordinary rules, in the absence of a special contract, and cannot claim the benefit of the provisions of the original contract. Adams Exp. Co. v. Harris, 120 Ind. 73, 40 Am. & Eng. R. Cas. 151.

PENNSYLVANIA STEEL CO.

v.

GEORGIA RAILROAD & BANKING CO.

(*Supreme Court of Georgia, July 23, 1894.*)

Carriers of Merchandise [(1) p. 565]—**Lien for Freight—Sale—Stoppage in Transitu.**—Where the same vendor, under a single contract of sale, shipped by rail several consignments of goods to the same vendee, each shipment embracing several car-loads, the carrier had the right to retain out of any one or more of the consignments enough of the goods in value to pay the charges for freight and storage upon all, without respect to the particular consignments out of which the goods were retained. And this right of the carrier has the same relation to the right of stoppage *in transitu* by the vendor which it has to the right of the consignee to claim delivery of the retained goods where no stoppage occurred. Payment of the freight and storage must be made before the consignor can obtain possession under the right of stoppage *in transitu*. (*Page 687.*)

ERROR from city court of Richmond. *Affirmed.*

Lien for Freight

Penn. Steel Co. v. Ga. R. & B. Co.

The Pennsylvania Steel Company, suing for the use of the receivers of said steel company, brought suit against the railroad company in trover, setting out substantially the following facts: In February, 1893, the steel company, in Philadelphia, Pa., by means of fraudulent representations of one Wheless, sold to the Richmond County Belt-Line Railway Company a number of tons of rails, with spikes, bolts, and switches to go therewith. These rails were shipped, consigned to said Belt-Line Railway Company, at Augusta, Ga., being shipped in car-load lots at different dates, and came into possession of defendant, at Atlanta, Ga., as one of the connecting lines of carriers from Pennsylvania, and were transported by it from Atlanta to Augusta. For each shipment of rails the Pennsylvania Railroad issued one bill of lading, and the defendant received the cars under said bill of lading and one waybill. On March 4, 1893, defendant received 9 cars, delivered 7, and retained 2, on which it claims freight and demurrage, \$980.90; March 7th, it received 10 cars, delivered 8, and retained 2, on which it claims freight and demurrage, \$1047.89; on March 8th, it received 5 cars, delivered 4, and retained 1, on which it claims freight and demurrage, \$436.45; and, on March 17th, it received 2 cars, delivered 1, and retained 1, on which it claims freight and demurrage, \$130.25. After discovering the fraud by which the credit was obtained, and learning of the insolvency of the Belt-Line Railway Company, the steel company, on June 9, 1893, served notice of stoppage *in transitu* on the defendant for the six cars held by it under its claim of lien for freight; tendering to it \$1021.14, being the full amount of all charges on the specific cars stopped. Defendant refused to deliver the six cars unless the steel company would also pay it \$1981.86, being the amount due it for freight and demurrage on cars of iron previously delivered to the consignee; defendant claiming that its lien for freight and charges on the cars delivered, as well as those undelivered, was superior to plaintiff's right of stoppage *in transitu*. The value of the iron stopped being about \$3000, and the entire amount of freight and charges claimed by defendant on cars delivered and undelivered being \$3003, defendant refused to deliver possession, plaintiff having refused to make any further tender than the \$1021.14.

Plaintiff claims that no title passed to any of the property,

Penn. Steel Co. v. Ga. R. & B. Co.

Lien for Freight

because of the fraud in obtaining the credit, but, even if title did pass, that it exercised its right of stoppage *in transitu* upon learning of the purchaser's insolvency, and that while the carrier's claim on the cars stopped might be good, as against the consignee, for freight due both on cars delivered and undelivered, its claim was inferior to plaintiff's claim, so far as freight was demanded on cars delivered. Plaintiff further claimed that each car contained a different number of tons of rails, and that the waybill showed the weight and number of tons on each car, and that the amount of freight due on each car was readily ascertainable; therefore, that each car, so far as plaintiff's rights were concerned, constituted a separate consignment, and that, in delivering the freight to the consignee, defendant departed from its general custom, which was to require cash before delivering freight, but upon refusal of the general freight agent to deliver without payment of freight the consignee arranged with some superior officer of the company, and thereupon obtained the cars delivered without payment of freight.

Defendant demurred upon the ground that its lien for freight on the cars delivered was superior to plaintiff's right of stoppage *in transitu*; and, the plaintiff having refused to tender freight and charges on cars delivered, defendant declined to deliver the six cars upon tender only of freight and charges on cars stopped.

The court sustained the demurrer, and ordered that the declaration be dismissed, unless plaintiff tendered to defendant the amount of freight and charges on cars delivered as well as those undelivered, it appearing from the pleading that the value of those undelivered was not equal to the freight and charges claimed by defendant. This plaintiff having refused to do, the declaration was dismissed.

Plaintiff excepted, alleging that the court erred (1) in holding that defendant's lien for freight on the cars delivered was superior to plaintiff's right of stoppage *in transitu*; (2) in holding that it was necessary for plaintiff to tender defendant the full amount of freight and charges on all the cars before it was entitled to receive the six cars stopped; (3) in refusing to hold that each car constituted a separate consignment; (4) in refusing to hold that defendant's lien was lost on cars unconditionally delivered, as against plaintiff's right of stoppage; (5) in sustaining the demurrer and dismissing the declaration.

Injuries to Goods

Central R. & B. Co. v. Cooper

J. S. & W. T. Davidson, for plaintiff in error.*J. B. Cumming* and *Bryan Cumming*, for defendant in error.PER CURIAM.—*Judgment affirmed.*

CENTRAL RAILROAD & BANKING CO.

v.

COOPER (M. L.).

(Supreme Court of Georgia, Feb. 27, 1895.)

Carriers of Merchandise [(1) p. 565]—**Injuries to Goods—Storage on Uncovered Platform.**—Where the sole ground of liability alleged in a declaration against a common carrier was that the defendant negligently and carelessly unloaded the plaintiff's goods in the rain, and stored the same on an open uncovered platform, "in the rain and weather," whereby the goods were rendered totally worthless, it was error to charge that if the goods were delivered to the wrong person, some one not authorized by the plaintiff to receive them, that would be a conversion by the defendant, and the plaintiff would be entitled to recover the full value of the goods, and to refuse to charge a written request to the effect that the action was not for the recovery of damages sustained by the plaintiff from the loss of his goods because of their delivery to the wrong person, but for damages resulting from the negligent manner in which the goods were unloaded and left exposed. (Page 689.)

Same—Delivery of Shipment [(1) p. 716]—**Agent of Consignee—What Constitutes.**—There being nothing in the pleadings or evidence properly presenting, as an issue in the case, the question whether the person by whom the plaintiff's goods were unloaded from the defendant's car was or was not authorized to receive the goods for the plaintiff, and the controlling question being whether that person, in unloading and storing the goods, was acting as the agent of the plaintiff or of the defendant, the court erred in so shaping its instruction to the jury as to present for their consideration the question first above stated, and in so qualifying the written requests of the defendant as to submit the question for their determination in connection with, and as a part of, the question of agency above mentioned. (Page 689.)

Same—Action for Injuries—Improper Charge to Jury.—The charge, as a whole, did not properly submit the real issues involved, nor authorize the jury to pass upon the merits of the defense, which, if found true, would render a recovery for the plaintiff legally impossible. Because of the errors above indicated, and irrespective of other alleged errors, there should be another trial.

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Injuries to Goods

ERROR from superior court of Houston county. *Reversed.**John R. Cooper*, for plaintiff in error.*Hardeman, Davis & Turner*, for defendant in error.

LUMPKIN, J.—1. The declaration alleged that the plaintiff shipped over the defendant's road 12 tons of guano, to be delivered to him at Perry, and that on its arrival at that place the company negligently and carelessly unloaded the guano "in the rain, and stored the same on an open, uncovered platform, in the rain and weather; that said guano was thoroughly wetted, and by said wetting, caused by said rain, it became totally worthless." No other ground of liability than as above stated was mentioned, or even hinted at, in the declaration; so there was no allegation upon which it would be legally possible to base a recovery in the plaintiff's favor upon the theory that the defendant was guilty of a wrongful conversion of the guano by delivering it to a person not entitled to receive it. Nevertheless, the court more than once instructed the jury, in substance, as indicated in the first headnote, and refused to charge a written request which correctly set forth the real character of the action.

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goods—Storage
on open plat-
form.

It hardly requires argument to show that the errors thus committed absolutely entitled the defendant—against whom the jury found a verdict for the full amount sued for—to a new trial. No plaintiff can recover upon a cause of action, however just or well sustained by proof, which is totally distinct and different from that alleged in his declaration; and this is so although palpably irrelevant evidence may have been received without objection. The instructions given by the court may, as abstract propositions of law, have been entirely correct, but they had no application or pertinence whatever to the issues involved in the case on trial.

2. The guano was unloaded from the railroad car by a boy named Allen, who was employed as a messenger at the depot of the defendant; but it does not appear that it was any part of his duty to unload freight cars. It is clear from the evidence that the expense of unloading the plaintiff's guano devolved upon him, and not upon the railroad company, and that he recognized this fact.

Delivery of
shipment.

The real vital question at issue in the case was whether

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Allen was employed by the plaintiff as his agent to unload the car, or whether, in unloading the same, Allen was acting as the servant of the depot agent. Upon this question the evidence was conflicting; but there was nothing either in the pleadings or in the evidence properly presenting as an issue in the case the question whether or not this boy was authorized to receive the goods for the plaintiff, or that he undertook so to do.

The court, however, in different portions of its charge to the jury, presented for their consideration and determination the question just indicated, and emphasized its supposed importance by making certain qualifications of written requests to charge submitted by the defendant's counsel. For instance, the court charged as follows: "If the railroad delivered the goods to the wrong person by mistake, or to a person not authorized to receive them, though they be delivered for the consignee or owner, the carrier believing him to be at the time the agent of such consignee or owner, that would not relieve the carrier, because the carrier must, at his peril, know that the person to whom he makes such delivery has authority to receive the goods." And again, after charging the following request: "If you should believe from the evidence that the plaintiff employed one Allen to unload the guano for him, and agreed to pay Allen fifty cents for unloading it for him, and Allen, being so employed by him, did unload the guano for him, and unloaded it negligently or improperly, or in the rain, and if the plaintiff was present at any time while it was being unloaded in the rain, and made no effort to prevent it, and did not at the time call the attention of the defendant's agent to the fact, or signify to defendant or its agent that he objected to the manner in which it was being unloaded, or make any request that it be stored differently, until several days later, when he refused absolutely to receive the guano, I charge you that you may consider these facts in determining the question whether the loss, if any, was not due to the plaintiff's own act, or attributable to his own negligence,"—the court qualified the same by adding after the words "employed one Allen to unload the guano for him," the words, "and received the goods", and after the words, "and Allen being so employed by him," the additional words, "and authorized by him to receive the goods."

Erroneous
instructions.

St. L. & S. F. Ry. Co. v. Bryan F. Co. Injury to Goods

In view of the real issue upon which the case should have been made to turn, the nature of which has been already stated, it seems clear, without further elaboration, that the above-quoted instructions must necessarily have been misleading to the jury, and that their effect was to cut off the defendant from its real defense.

3. The motion for a new trial contained numerous grounds. It is unnecessary, however, to notice them in detail, enough having been already said to show that the case was not properly tried, and to outline the principles which should control its determination. We will only add that, taking the charge as a whole, it did not even substantially submit the real issues involved in the case, but altogether prevented the jury from passing upon the merits of the defense, which, if found true, would render a recovery for the plaintiff legally impossible.

Judgment reversed.

ST. LOUIS & SAN FRANCISCO RAILWAY CO.

v.

BRYAN FRUIT CO.

(Court of Appeals of Kansas, So. Dept., Oct. 23, 1895.)

Carriers of Merchandise [(1) p. 565]—Claim Against Carrier for Damage to Shipment—Sufficiency of Notice of Claim—Amendment of Pleading.—A claim in writing which has been presented to the railway company accompanied by a letter explaining the full particulars of the transaction, charging it with the loss of 50 per cent. of 147 boxes of oranges, and for a return of the freight paid it thereon, is sufficient to notify said railway company of a claim against it for damages caused by the negligence of said company in the transportation of said oranges; and, when said claim has been filed before a justice of the peace as a bill of particulars, the plaintiff may, upon leave obtained from the court, file an amended bill of particulars setting out said damages and negligence, and does not thereby substantially change the claim against said railway company. (Page 693.)

Same—Statutory Liability of Carrier—Sufficiency of Instructions.—The liability of a railroad company for damages to shipments is, in Kansas, governed by Gen. Stats. 1889, Par. 1250, which provides "that railroads in this state shall be liable for all damages done to person or property, or done in consequence of any neglect on the part of the railroad companies," and the liability of the railway company in this case is held to

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come within this statute, and the instructions given by the trial court herein held correct. (*Page* 696.)

Action for Damages to Shipment—Giving Instructions—When Not Error to Refuse.—Where there is nothing in the pleadings or evidence upon which to base instructions asked for, it is not error to refuse to give them. (*Page* 696.)

ERROR from Sedgwick county district court. *Affirmed.*

A. A. Hurd and *Bentley & Furgerson*, for plaintiff in error.
Rohrbaugh & Rausch, for defendant in error.

DENNISON, J.—This action was originally brought in justice court upon the following bill of particulars: “Wichita, Kansas, Nov. 28, 1888. St. Louis & San Francisco Railway Company, bought of Bryan Fruit Co., wholesale fruit, oysters, and produce & general commission merchants: 147 bxs. oranges, at \$2.25,—\$330.75. To loss on, same, 50%, \$165.38; freight on above, at 80 lbs. pr box 5880 lbs., at .67 pr 100 lbs., \$39.40,—\$204.78. Car No. 3058 C. S. F. Wichita Claim No. 170. B. L. Keenan, Justice of the Peace. Filed June 9, 1889. Returned 6/24, A.M.” Judgment by default was rendered on said bill of particulars for \$209.25, and was by the defendant appealed to the district court.

By leave of the district court the plaintiff filed the following amended bill of particulars (omitting title): “The plaintiff, the Bryan Fruit Company, complains of the defendant, the St. Louis & San Francisco Railroad Company, defendant, and says that defendant is a corporation and a common carrier, and has a line of road running from Nichols Junction into the city of Wichita, Sedgwick county, state of Kansas; that said defendant undertook for hire to carry a car-load of fruit for plaintiff from said Nichols Junction to said city of Wichita, in the month of November, 1888; that plaintiff placed in the hands of defendant, as such common carrier, said car-load of fruit on the day and year last aforesaid, among which was 74 boxes of oranges, of the value of \$165.38, which plaintiff delivered to defendant in good condition, and paid defendant the sum of \$39.40, as freight, in consideration of which defendant undertook and agreed to safely carry said oranges to said city of Wichita, and deliver the same to plaintiff in good condition; yet, nevertheless, defendant did not safely carry said oranges, and did not deliver the same to

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plaintiff in good condition, but the defendant negligently and carelessly permitted said oranges to heat and rot, until the same were worthless to plaintiff, to plaintiff's damage \$204.78. Wherefore plaintiff prays judgment against defendant for the sum of \$204.78, and interest thereon at 6% per annum from November 8th, 1888, and costs of this action. Rohrbaugh & Rauch, Attorneys for Plaintiff. Filed Jan. 3/90. C. H. Luling, Clk., by Jek."

The defendant moved to strike the amended bill of particulars from the files, "for the reason that the same changes the nature of the cause of action, and is a different cause of action from that alleged in the original bill of particulars," which motion was by the court overruled. Trial was had before a jury on January 19, 1891, who returned a verdict against the defendant of \$231.74.

The defendant brings the case here for review, and in its brief alleges three assignments of error, as follows:

First. "The court erred in overruling defendant's motion to strike from the files the amended bill of particulars.

Second. The court erred in its charge to the jury.

Third. The court erred in refusing to give certain instructions asked by the railway company.

Section 139 of the Code reads as follows: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party or correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleadings or proceedings to the facts

Sufficiency of
notice of in-
jury to per-
mit amend-
ment of peti-
tion.

proved when such amendment does not change substantially when any proceeding fails to conform in any respect to the the claim or defense; and provisions of this Code, the court may permit the same to be made conformable thereto by amendment." The plaintiff clearly had a right to amend his bill of particulars, unless it substantially changed his claim. The claim of the plaintiff is for damages to oranges, caused by the negligence of defendant while shipping the same over its line of road.

The question to be determined in considering this point is whether the main facts constituting the cause of action are so stated that the defendant is clearly informed of the nature of

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the claim against it, and is not misled into supposing that it will be required to make a defense upon one cause of action, or one transaction, and by the amendment is required to defend as against another cause of action, or another transaction. "A bill of particulars need not be drawn with the same fullness and precision as the petition. It is sufficient if the main facts are stated in a general way, so that the defendant is not misled, but clearly informed of the nature of the claim against him." *Lobenstein v. McGraw*, 11 Kan. 645. "It must be remembered that the pleadings in a justice court are not to be subjected to the same strictness of construction as those in the upper courts; * * * so that, if the essential facts are stated in such a way that the defendant cannot be misled as to the real nature of the claim against him, the bill must be taken as sufficient." *Railway Co. v. Brown*, 14 Kan. 557.

In the case at bar the defendant could not have been misled as to the nature of the claim set forth in the bill of particulars. It appears that after the receipt of the shipment of oranges, and on November 20, 1888, the Bryan Fruit Company made out a bill against the railway company, and it was probably made out on one of their bill heads, and it contains the words "Bought of Bryan Fruit Co.," and it clearly states to said railway company that there was a loss of 50% on 147 boxes of oranges, at \$2.25 a box, and the freight, at 80 lbs. per box, or 5880 lbs. at 67 cts. per 100 lbs. The evidence discloses the fact that this claim was presented to the railway company, and accompanied by the following letter: "Office of Bryan Fruit Company, Wholesale Fruit, Oysters & Produce, and General Commission Merchants. Wichita, Kan., Nov. 20, 1888. Wichita Claim No. 170. Mr. C. R. Gray, Com'l Agent Frisco Ry., City.—Dear Sir: Inclosed we hand you our claim No. 3 for damage on 147 boxes oranges shipped with bananas in C. S. L. car No. 3058 from New Orleans November 5th, and delayed by snowstorm on Frisco R'y from November 8th till November 12th, said damage being caused by delay. There was a man in charge of car from Springfield to Wichita, who did all in his power to keep fruit from decaying, but it was impossible to ventilate car sufficiently to save oranges for such a length of time, without causing a total loss of the bananas by chilling. The man would have gotten the car through without loss if the delay had not occurred. The

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car was inspected thoroughly here upon its arrival by your representative, Mr. Mills. Kindly hurry the adjustment of the claim, and oblige, Yours very truly, The Bryan Fruit Company. (B) \$204.78. Commercial Office, Nov. 29, 1888. St. L. & S. F. Ry., Wichita, Kan."

This bill seems to have been filed by the railway company as Wichita claim No. 170, and the payment refused. The same bill, which was presented to the railway company, and payment thereof refused, was by them returned to said Bryan Fruit Company, and was by said Bryan Fruit Company filed before the justice of the peace as its bill of particulars. This bill of particulars seems to be very much like the one filed before the justice of the peace in the case of Lobenstein v. McGraw, 11 Kan. 648, which is as follows: "Leavenworth, Kan. W. C. Lobenstein to Patrick McGraw, Dr. To damages sustained by allowing a large pile of buffalo hides, exposed on the said Lobenstein's lot, on the northeast corner of Choctaw and Third Streets, in Leavenworth city, on the 9th day of June, 1872, thereby causing the said McGraw's horse to run off, and thereby damaging said horse and said McGraw's buggy to the amount of one hundred dollars."

In commenting on said bill of particulars, Mr. Justice BREWER in his opinion says: "It is not to be expected that a bill of particulars will be drawn with the same fullness and precision as a petition. Much of the business in justice court is done by the parties themselves, and not through the instrumentality of attorneys. It is well that this is so, for thus a convenient, expeditious, and cheap method of settling minor disputes and collecting small accounts is furnished to all. The justices themselves are selected, not on account of their legal knowledge, but because of their good common sense. The chief value of these tribunals, to the poorer classes at least, would be lost if the rules of pleading in them were made so technical and difficult that the services of an attorney were made necessary in every case. In the case before us there is no possibility that the defendant was misled by the bill of particulars, or that he failed to understand fully the nature of the claim against him. The court, therefore, did not err in holding it to be sufficient." See, also, Bogle v. Gordon, 39 Kan. 31.

The defendant in the case at bar must have known the exact nature of the claim made against it, was not misled in

Bill of par-
ticulars—
Sufficiency.

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any way, and was enabled to prepare for a defense against the exact claim set out in the amended bill of particulars. It knew that the first claim was for damages by reason of the loss of oranges, and that there was no claim that it had purchased any oranges from the Bryan Fruit Company; therefore, the nature of the cause of action was not substantially changed, substantial justice has been done, and the court below did not err in refusing to strike the amended bill of particulars from the files.

The second assignment of error, which is to the instructions given by the court, relates to the question of negligence of the railway company, and the plaintiff in error cites numerous authorities as to the liability of common carriers. All of them, however, are from the decisions of other states. The liability of railroads for damages in this state is laid down in paragraph 1250 of the General Statutes, of 1889, which is as follows: "That railroads in this state shall be liable for all damages done to person or property when done in consequence of any neglect on the part of the railroad companies." We have carefully examined all the instructions given, as well as the pleadings and evidence, and, applying the above statute to them, we find no error was committed by the court below in giving said instructions.

The third assignment of error, which is in refusing to give the instructions asked for by the railway company, is based upon the question of the negligence of the plaintiff. The evidence shows that the bookkeeper of the Bryan Fruit Company went to Springfield, Mo., to meet the car of fruit, that he examined the car from time to time, and ascertained its temperature by means of a thermometer, and that he suggested to the conductor that the car should be sent to Neodosha, and put into the round-house, where the ventilators could be used and the fruit saved. There is no evidence that the fruit was in his possession or under his control; neither is there any evidence as to why he was sent to meet the fruit. For all that appears to the contrary, he paid his fare, both going and coming, and might have been sent for the sole purpose of ascertaining whether there was any negligence on the part of the railway company in transporting and caring for said fruit. There was nothing upon which to base instructions as to the negligence of the

Statutory liability of carriers.

Sufficiency of evidence of negligence.

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plaintiff, and hence it was not error to refuse to give said instructions.

The judgment of the district court will be affirmed.

All the judges concurring.

AMERICAN SUGAR REFINING CO.

v.

MCGHEE (C. M.) *et al.*, Receivers.

(*Supreme Court, Georgia, March 11, 1895.*)

Carriers of Merchandise [(1) p. 565]—**Delivery** [(1) p. 716]—**Refusal of Goods by Consignee** [(3) p. 722]—**Liability of Carrier**.—Where goods were shipped over the lines of connecting railways to a consignee designated in the bill of lading, and on arrival at destination the receivers of the railway company which completed the transportation tendered delivery to that consignee, and he declined to receive the goods, the liability of the receivers as common carriers thereupon ceased, and they became liable as warehousemen only, and as such were chargeable with the duty of notifying the consignor of the consignee's refusal to accept the goods, and with the further duty of holding the same subject to the order of the consignor. (*Page 703.*)

Same—Same—Delivery to Broker of Consignor—Broker's Authority.—The action being by the consignor against the receivers to recover the goods or their value, and the only defense set up and relied upon by the defendants being, in substance, that they had delivered the goods as directed by a broker of the plaintiff, and that he was the duly authorized agent of the plaintiff to direct such delivery, and there being no sufficient evidence to warrant a finding that he was in fact such an agent of the plaintiff, the judge below, who tried the case without a jury, erred in adjudging that the defendants were not liable. (*Page 703.*)

Broker of Consignor—Authority—Local Custom as Giving Authority.—The broker under his general powers as such, had no authority either to receive the goods or to direct to whom they should be delivered; nor could such authority be conferred upon him, so as to bind his principal, the consignor, by any local custom or usage, the latter having no knowledge thereof, and consequently not contracting with reference thereto in making the shipment. (*Page 706.*)

ERROR from city court of Macon. *Reversed.*

Ellis & Jordan and *S. A. Reid*, for plaintiff in error.

Hill, Harris & Birch, for defendants in error.

LUMPKIN, J.—The American Sugar Refining Company brought an action against receivers of the East Tennessee

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Virginia & Georgia Railway Company for the recovery of 100 barrels of sugar, or the value of the same. The

Facts.

material allegations of the declaration are as follows:

On January 24, 1893, the plaintiff delivered the sugar to the N. O. & N. E. Railroad Company, to be transported over its line to its terminus, and thence over the line of the East Tennessee, Virginia & Georgia Railway, of which the defendants were in charge as receivers, to Macon, Ga., the shipment having been made under a bill of lading by the terms of which the sugar was consigned to Rogers, Jones & Moore, of the city last named; and the defendants received the sugar for transportation and delivery under that bill of lading. The plaintiff was really the owner of the sugar when the defendants received it, the shipment having been made upon a fraudulent order given by a broker without authority from the consignees, who did not order nor buy the sugar, nor consent to its shipment to them, and who disclaimed any right or title to or interest in it, and refused to receive it, which facts were not known to the plaintiff till afterwards. It was the duty of the defendants, upon the refusal of the consignees to receive the goods, to notify the plaintiff of this fact, and redeliver to it, or to its order. The defendants failed to observe this duty, but, on the contrary, converted and appropriated the sugar to their own use as receivers, to the plaintiff's damage in the sum of \$1640.35, which was the value of the consignment.

In order that the nature of the defense may be clearly understood, we will now set forth in full those portions of the defendants' pleas upon which they relied. They are as follows: "And for further answer in this behalf, these

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defendants show that the waybills or shipping directions which accompanied the freight in question required these defendants to turn over and deliver said goods to Rogers, Jones & Moore, of the city of Macon; that upon the receipt of said goods in the warehouse of the East Tennessee, Virginia & Georgia Railway Company at Macon, Ga., these defendants, through their agents at said point, tendered the said goods to the consignees, Rogers, Jones & Moore, as by the shipping directions required to do; that immediately said Rogers, Jones & Moore declined to receive said goods, alleging that they were not willing to receive the same, and directing the agent of these defendants to consult with John Farrar, agent or broker of the plaintiffs in this city that there-

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upon the said agent notified the said John Farrar, broker, as aforesaid, upon whose order the said goods had been purchased, that the goods were ready to be delivered, and that Rogers, Jones & Moore, the consignees, declined to receive the goods, and had directed these defendants to consult with him; thereupon the said John Farrar immediately directed these defendants to deliver the goods to H. D. Adams & Co., a responsible firm of this city; that pursuant to such instruction, and having often been instructed before in similar cases by the said John Farrar, these defendants, through their agents, delivered over the goods to the said H. D. Adams & Co., for the account of the plaintiffs, as directed by the plaintiffs' broker so to do. These defendants having notified the consignors through their agent, as aforesaid, and having been by him directed as to the disposition of the goods, followed his instructions to the letter, and delivered them over to the persons designated by the said broker. Wherefore these defendants show that they have fully discharged their duty in and about said matter, and that there is no liability upon them to account for any matter or thing connected with the subsequent disposition of said merchandise.

And, for further answer, in this behalf these defendants show that they were cognizant, from a long course of dealing through their agents at Macon, of the fact that said Macon Brokerage Company, or John Farrar & Company, or both, of which John Farrar was one of the partners or principal agent, had been for a long time the agent of the plaintiffs in placing their orders and the sale of products of the plaintiffs in this city; that when the said Rogers, Jones & Moore, the consignees of said goods, refused to receive them, and directed the defendants to consult with the said John Farrar, as a member of the said Macon Brokerage Company or John Farrar & Company, these defendants immediately did so, in accordance with the custom that had heretofore prevailed with reference to similar shipments, and the said John Farrar, for the said Macon Brokerage Company or John Farrar & Company, having directed these defendants to turn over the said goods to H. D. Adams & Co., a responsible firm, fully solvent, and fully able to pay for the same, these defendants obeyed such instructions. The said John Farrar had been placing orders for the consignors for a long series of years, and was known

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to this defendant as the agent and broker of the said plaintiffs in this city. He had authority, both by custom and by direct mandate from the plaintiffs, to place their orders in this city, and these defendants only followed the instructions that they received from him in this case, as it was known to them, from his course of dealing, that he was the authorized agent of the plaintiffs to direct the disposition of the goods, as well as to procure and place orders therefor. These defendants delivered the goods to the parties to whom they were consigned. Those parties having refused the goods, and having directed these defendants to consult with John Farrar, as aforesaid, the goods were delivered to H. D. Adams & Co., on instructions from him, as broker of the said plaintiffs."

The case, by consent, was tried by the judge without a jury. The evidence, as a whole, showed substantially the following state of facts: John Farrar, or the Macon Brokerage Company, under different firm names (John Farrar, however, always being a member), did business for the plaintiff as its broker in the city of Macon from 1890 until and including the month of January, 1893. During this period, Farrar, or the firms of which he was a member, sent large numbers of orders to the plaintiff, at the instance of various parties. He had, however, no authority to make sales for the plaintiff, but only to submit orders for its acceptance or refusal, receiving commissions on sales completed; and in no instance was he authorized to make collections for the plaintiff, but purchasers remitted to it directly. He was not authorized to dispose of any goods for the plaintiff without instructions from it, and in the present case he was not authorized to take possession of or dispose of the sugar, or give any directions as to its delivery. The plaintiff gave him no instructions whatever concerning it. The shipment of the sugar was brought about as follows: Farrar, for a fraudulent purpose of his own, and without authority from Rogers, Jones & Moore, sent an order to the plaintiff to ship to them 100 barrels of sugar, and it did so, believing that the order was an honest one and duly authorized. Farrar informed Rogers, Jones & Moore of the sending of the order, but represented that it resulted from a mistake caused by his using the wrong cipher, and requested them to notify him of the arrival of the sugar. When it did arrive, the agent of the defendants notified Rogers, Jones & Moore of the fact, and tendered delivery to

Facts con-
tinued.

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them, the agent being at the time entirely ignorant of the fraud which had been practised by Farrar. Rogers, Jones & Moore informed the agent that the sugar was not for them, and declined to receive it, but stated that Farrar would dispose of it. They also, as the latter had requested, informed him of the arrival of the sugar, and mailed to him, without indorsement, the bill of lading which had been sent to them. He, without informing the plaintiff of the rejection of the consignment by Rogers, Jones & Moore, and without presenting to the agent of the defendants the bill of lading, simply telephoned the agent to deliver the sugar to H. D. Adams & Co.; and the agent, without having notified the plaintiff of the refusal of Rogers, Jones & Moore to receive the sugar, and without having asked of the plaintiff any directions in the matter, and also without requiring from Farrar the production of the bill of lading, delivered the sugar, as he had directed, to H. D. Adams & Co., a responsible firm, who afterwards paid Farrar for the same. He absconded without paying anything to the plaintiff, which, however, never expected nor demanded payment from him. Goods were very frequently delivered without requiring the bill of lading to be surrendered.

When the plaintiff had become informed of the rejection of the consignment by Rogers, Jones & Moore, it made a demand upon the defendants' agent for the sugar, and, in **Facts con-** reply to this demand, the attorneys of the defend- **tinued.** ants wrote the following letter, addressed to the plaintiff's attorney: "Your demands have been referred to us. In reply to yours, we beg to state that the goods in question were delivered to Messrs. H. D. Adams & Company by direction of the Macon Brokerage Company, through Mr. Farrar, of this place. This delivery was made on or about February 1, 1893. The Macon Brokerage Company claim to be acting for your client, and it was known to this company that they had been representing them in other similar transactions, and this sugar was shipped on the order of said brokerage company." There had been previously frequent dealings between the agent of the defendants and Farrar in his capacity of broker. He often hurried up deliveries, and also gave directions about placing cars for consignees, and his instructions were carried out; but in every instance except the present his directions related to deliveries to the proper consignees. This was the first time when the defendant's agent "had to change the

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consignee." The value of the sugar was proved. There was also a considerable amount of evidence as to certain alleged customs in the city of Macon.

It was shown that, according to the usage of trade recognized by the wholesale dealers of that city, when a merchant, for any reason, rejected a consignment shipped to him upon the order of a broker, it was customary to notify the broker of such rejection, without also communicating the fact to his principal, leaving the broker to arrange for the final disposal of the shipment. Upon such notification to the broker, it was his duty to communicate with his principal, and get instructions as to how the goods rejected should be disposed of. The broker had no power to assume possession of the goods, to make a resale of them, or to give any direction as to their delivery, save upon receiving express authority from his principal; but the railroad agents usually respected the broker's orders as to final delivery of the goods, when the broker was known to be representing the consignor, and had given the order upon which the goods were shipped, without requiring him, it would seem, to exhibit any evidence of authority from his principal to accept the consignment in the principal's behalf, or to direct delivery to a person other than the original consignee, named in the bill of lading. It did not, however, appear that a delivery of this kind had ever been made to Farrar, acting as the broker of the plaintiff, or any other principal he was known to represent.

It was further shown that it was against the rules of the sugar-refining company to give the discount allowed on orders for 100 barrels of sugar, unless the whole of that amount was taken by a single firm or person. It was customary, however, through the contrivance of Farrar, for the merchants of Macon to evade this rule by several of them combining together, giving an order in the name of one only of them, and directing shipment accordingly. When the sugar arrived, Farrar would carry out the scheme by going around, in behalf of the nominal consignee, to all the other merchants interested, taking the check of each for his proportion of the price, and giving him an order on the railroad for the amount of sugar to which, under the arrangement, he was entitled. Farrar would then deliver the checks thus collected to the merchant in whose name the shipment was made, who thereupon would send to the sugar company

Facts contin-
ued.

his individual check for the price of the entire consignment. The bill of lading would be turned over to Farrar, who, upon surrendering it to the railroad company, would thus be enabled to get possession of the consignment, and direct its distribution upon his written orders to several parties interested therein. It was not shown that the plaintiff had any knowledge at all of the customs prevailing in Macon, whatever they were, or dealt with reference to the same. The judge rendered a judgment in favor of the defendants, and the plaintiff made a motion for a new trial, to the overruling of which it excepted.

1. We think that, under the facts stated, the receivers of the railway company had a perfect right to treat the consignment exactly as if Rogers, Jones & Moore had actually ordered the sugar. They were the consignees designated in the bill of lading, and the defendants' agents did precisely the proper thing in tendering delivery to them. This being so, when these consignees declined to take the goods, the liability of the defendants as carrier ceased, and they became liable as warehouseman only. As such, it was their duty to notify the consignor of the consignee's refusal, and also to hold the goods subject to the consignor's order. Of course, an order for the delivery of the sugar from an agent of the consignor having authority to give it would be the legal equivalent of such an order from the consignor itself. We shall assume that the propositions announced in this division of this opinion will be accepted as sound and correct, without stopping to elaborate or discuss them.

Consignees'
refusal to re-
ceive goods.

2. The case was earnestly argued in this court by counsel for the defendants in error upon the line that the conduct of Rogers, Jones & Moore amounted to such a *quasi* acceptance of the consignment as would justify a delivery to another upon their order or direction. It was strenuously insisted that, by referring the defendants' agent to Farrar, the consignees made him their agent to give direction as to the delivery of the sugar, and that consequently his order to deliver the same to H. D. Adams & Co. was the act of Rogers, Jones & Moore, and a disposition of the sugar, so far as the defendants were concerned, by the consignees themselves. Impressed by the earnestness and

Same—Deliv-
ery to broker.

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zeal of the counsel, we most carefully examined the record to ascertain if it contained anything upon which a defence of the nature just indicated could be rested; but we were unable to find any support for such a defence, either in the pleadings or in the evidence. As will have been seen, the defendants' pleas repeatedly state that Rogers, Jones & Moore refused to receive the goods, the expression used in one instance being that they "declined to receive the goods, alleging that they were not willing to receive the same."

The pleas also distinctly set up that the defendants gave notice of this refusal to the consignor, through Farrar, as its agent; that he was its authorized agent to direct the disposition of the goods; and that delivery was made in accordance with his instructions, as the consignor's broker. The previous dealings between the defendants and Farrar, and the customs prevailing in Macon, were alleged in support of the proposition that he was the general agent of the sugar-refining company, and, as such, entitled to direct what should be done with its goods. The above quoted letter, written by the defendant's attorney, shows that the defendant's claim from the very beginning was that the delivery to H. D. Adams & Co. was made on the order of the brokerage company, representing the sugar-refining company, and contains not even a hint that delivery was made upon any authority or direction given by Rogers, Jones & Moore, as consignees. It is true there is an expression in one of the pleas that the defendants "delivered the goods to the parties to whom they were consigned"; but this cannot be taken as meaning literally what it says. This expression is immediately followed by a recital that these parties refused the goods, and there can be no possible doubt, from the pleas as a whole and from the evidence, that the defendants never seriously claimed that there had been a delivery to Rogers, Jones & Moore, the consignees, but only that delivery was tendered to them, and they thereupon directed that Farrar be consulted, with the additional statement that he would dispose of the goods. So the real defense in this case was that delivery was made on Farrar's order; that he was the plaintiff's agent, duly authorized to give the order; and that, consequently, the delivery so made was a full and complete legal protection to the defendants against the plaintiff's demand.

In testing the merits of this defense, we will first inquire

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whether or not the mere fact that Farrar was the broker of the plaintiff authorized him to direct a delivery of the sugar, after the refusal of Rogers, Jones & Moore to accept it, so as to make such delivery binding upon the plaintiff. The powers of Farrar as the plaintiff's broker were clearly and distinctly shown by the evidence, from which it appears that he was simply a merchandise broker, with limited authority, and having no special or express power to do anything beyond such acts as brokers of this kind could usually do in the conduct of their business. He was a mere middleman to negotiate sales by submitting offers to his principal. He had not even the right to make a binding contract of sale in its behalf, and it is absolutely certain that he had no authority to order any disposition of its goods other than to see that they were delivered to customers who had actually purchased them.

Power of
assignor's
broker.

Some confusion has arisen by using the word "broker" in cases where the person referred to was really a factor. Mr. Justice BRADLEY, in *Slack v. Tucker*, 90 U. S. 330, says: "The difference between a factor or commission merchant and a broker is stated by all the books to be this: A factor may buy and sell in his own name, and he has the goods in his possession; while a broker, as such, cannot ordinarily buy or sell in his own name, and has no possession of the goods sold,"—citing in a footnote, *Story, Sales*, § 91; *Story, Ag.*, § 34; 2 *Kent Comm.*, 622. In *Story, Ag.* § 28, it is said: "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade," etc.; and that "he is strictly, therefore, a middleman intermediate negotiator between the parties." In the section of this work cited by Mr. Justice BRADLEY, it is stated that, while the factor is intrusted with the possession, management, control, and disposal of the goods to be bought or sold, a broker usually has no such possession, management, control, or disposal of the same. Again, in *Tied Sales*, § 272, it is said that a broker is not authorized to receive payment for goods sold by him, and that he has no implied authority to rescind a sale, and, without express authority, cannot appoint subagents and turn the business over to them. In *Ewell's Evans, Ag.* *4, we find a quotation from Chief Justice ABBOTT in the well-known case of *Baring v. Corrie*, 2 *Barn. & Ald.*

"Factor"
and broker—
Distinction.

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143, in which the distinction between a broker and a factor is clearly pointed out; and it is there stated that a broker is not trusted with the possession of goods the sale of which is effected through his agency. The same distinction is stated in Mechem, Ag. § 13, and the author adds that the broker does not ordinarily have the possession of the property which he may be employed to sell, and that his contracts are always made in the name of his employer.

After an examination of numerous authorities, including those above cited, this court, in the case of *Kelly v. Kauffman Milling Co.*, 92 Ga. 105, reached the conclusion that

Authority of
merchandise
broker.

the authority of a merchandise broker, under his general powers as such was quite limited, and that he had no authority to rescind a contract of sale, receive from the purchaser of goods the bill of lading indorsed by him, and thus obtain possession of the goods from the carrier, or cause their delivery to a stranger to whom he had transferred the bill of lading. That case, in effect, rules that such a broker as Farrar had no right or power, under the facts disclosed by the record in the present case, to bind the sugar-refining company by an order to the defendants for the delivery of the sugar to H. D. Adams & Co., after its rejection by Rogers, Jones & Moore.

3. The only remaining question is whether or not, under the local customs or usages prevailing in the city of Macon, Farrar had authority either to receive the goods himself or to direct to whom they should be delivered, so as to bind his principal. The truth is it would be a strain to hold that, under the evidence submitted, there was in Macon any custom from which any such authority on the part of Farrar could be derived, even if the plaintiff knew and was bound by the customs of trade in that city; but it was not pretended that it had any knowledge whatever of any local custom or usage prevailing in Macon, or that it made contracts with a reference thereto in selling goods in that market. We think it would be exceedingly unjust to hold the plaintiff bound by any custom in the city of Macon of which it was totally ignorant. Customs are *quasi* laws which have no extra territorial operation. A custom prevailing in Macon would not *proprio vigore* have any force in Atlanta, much less in New Orleans. This being so, no one is bound to take notice of a special custom, as he would be of

Custom as
giving broker
authority.

American S. R. Co. v. McGhee

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a general rule of law. Therefore, actual knowledge of the existence and observance of a mere local custom is necessary to charge one who does not come directly within the scope of its operation. A merchant in New Orleans could not be presumed to know the customs of Macon, and, it not being his duty to take notice of the same, he cannot be held to have impliedly contracted with reference to such customs, unless it is affirmatively shown that he had actual knowledge of the same. The Kauffman case, *supra*, is also in point upon the particular question with which we are now dealing. It appeared in that case that an effort was made to enlarge the authority of the broker under the general law by proving a local custom or usage prevailing in Atlanta, under which it was claimed that brokers were recognized as representing the person who employed them to sell in afterwards cancelling sales and taking charge of the goods themselves; and it was decided that no such custom would affect the seller unless it was known to him, so that his assent thereto could be reasonably inferred.

So, on the whole, we conclude that, under the facts, the judge erred in rendering a judgment in favor of the defendants. We, of course, recognize the correctness of the principle asserted by counsel for the defendants in error that, when the liability of the defendants became that of mere warehousemen, they were bound only to exercise ordinary diligence in making a delivery of the goods; but we are constrained to hold that they failed to observe even this degree of diligence. Granting that notice to Farrar of the rejection of the consignment by Rogers, Jones & Moore was, in law, equivalent to notice of this fact to the sugar refining company, it by no means follows that a delivery to Farrar or to his order was authorized. On the contrary, we are decidedly of the opinion that the evidence fails to show any lawful excuse or justification for such delivery, and that ordinary diligence would have required defendants to go at least one step further, and obtain satisfactory evidence that Farrar really had authority to direct the delivery in behalf of the plaintiff, if such was the fact; and, if not, to hold the goods subject to the consignor's order.

Judgment reversed.

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SPENCE (and NEFF)

v.

NORFOLK & WESTERN R. Co.

(Supreme Court of Appeals of Virginia, Aug. 8, 1895.)

Carriers of Merchandise [(1) p. 565]—**Delivery** [(2) p. 716]—**Right of Consignor, Shipping under Special Contract, to Sue Carrier for Damages Resulting from Delay in Transportation.**—Where a special contract is made for the carriage of goods whereby the shipper guarantees the payment of the freight, and the consignee is not entitled to the possession of the goods until he accepts a draft attached to the bill of lading the shipper retains such an interest in the goods as will entitle him to maintain an action against the carrier for failure to deliver them at their destination within a reasonable time. (*Page 709.*)

Same—Form of Action.—In such a case the shipper may maintain an action against the carrier either on the case in tort or in assumpsit on the contract. (*Page 714.*)

ERROR to Wythe county circuit court. *Reversed.*

W. S. Poage, for plaintiffs in error.

Bolling & Stanley, for defendant in error.

BUCHANAN, J.—The plaintiffs in error brought an action on the case, against the defendant in error, for damages for failing, as a common carrier, to deliver at their destination, within a reasonable time, two carloads of vegetables and fruit.

The verdict of the jury and the judgment of the trial court were in favor of the defendant, and to that judgment this writ of error was allowed.

The principal error complained of was the refusal of the court to give instruction No. 5 asked for by the plaintiffs, and the giving of an instruction of its own in lieu thereof. The instruction asked for, and which was refused, was as follows:

“The court further instructs the jury that, when the risk of the safe transportation of the goods is upon the consignor, he will be considered as the owner, for the purpose of maintaining an action against the carrier for their loss or injury.

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“Therefore, if the jury shall believe from the evidence in this case that the risk of the transportation of the goods and produce set out in the plaintiffs’ declaration was upon them [plaintiffs], they are entitled to maintain this action for said loss or injury.”

The instruction the court gave in lieu of it is in these words: “If the jury believe from the evidence that the plaintiffs contracted to sell to De Witt & Co. and Bayer & Son certain produce; and if the jury believe that, according to the true intent and meaning of the said contracts between the said plaintiffs and the said De Witt & Co. and Bayer & Son, the plaintiffs sold the said produce to the said De Witt & Co. and Bayer & Son, at an agreed price, free on board the defendant’s cars at Rural Retreat, and that the plaintiffs did deliver said produce on the defendant’s cars at Rural Retreat, and consigned the same to said De Witt & Co. and the said Bayer & Son at Columbus, Ohio, and Charleston, S. C., to be delivered to the said consignees at their destinations by the defendant, and that plaintiffs charged the said De Witt & Co. and Bayer & Son, on the books of the plaintiffs, with the price of said goods so shipped to them—then the plaintiffs cannot maintain this action, and the jury should find for the defendant.”

On the trial of the cause the defendant does not seem to have controverted its liability for failure to perform its duty in carrying the goods shipped, but relied entirely upon the defense that the plaintiffs had no interest in the goods shipped after they were delivered to the defendant, and therefore had no right of action against it for such failure of duty, or, if they had any right of action at all, it was an action of assumpsit on the contract, and not an action on the case in tort.

Question presented.

The question has been very much discussed in this country whether the shipper or consignor can maintain any action against a common carrier for damages done to goods after they have been received by such carrier for the purpose of carriage, and before they have been delivered to and received by the consignees, when the shipper or consignor had no right of property, general or special, in the goods, and no right or interest in their safe carriage, except that arising from the bill of lading.

Right of consignor to maintain action for delay.

One line of cases holds that, since the shipper or consignor

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has parted with all interest in the property, he cannot be injured by the failure of the common carrier to perform its duty, or to keep its contract, and the consignee or owner alone can maintain the action.

Another line of cases holds that, inasmuch as the contract for shipment was made by the shipper or consignor, he has the right to maintain such action, because the carrier agreed with him to carry the goods safely, and within a reasonable time, and the action is for the breach of that agreement.

This subject was discussed at length, and with great learning and ability, by Chief Justice SHAW, in the case of *Blanchard v. Page*, 8 Gray 281. The facts of that case showed that the plaintiffs in the action against the carrier had sold goods to another party, who had paid for them, and they afterwards delivered the goods to the common carrier, to be forwarded for them. When they delivered them to the carrier, they took from it a bill of lading purporting to be a contract with the shippers to carry and deliver the goods to the purchaser. The goods were lost, and an action was brought by the shippers against the carrier for their value, upon the contract in the bill of lading. It was admitted that the shippers had no interest or property in the goods at the time of the shipment, and it was for that reason contended that they could not maintain the action; but the court held, notwithstanding the fact that they had no interest in the goods shipped, that an action could be maintained upon the contract. And this position was sustained by an argument, both upon general principles and upon authority, which, as Mr. Hutchinson says in his work on Carriers, seems unanswerable. In a later case decided by the same court it was held that, where there was no bill of lading nor other writing evidencing the contract, an action could be maintained by the consignor, who had no interest in the property shipped, nor an express contract with the carrier. *Finn v. Railroad Corp.*, 112 Mass. 524.

Mr. Hutchinson, in his work on Carriers, after discussing this question at length, reaches the conclusion that the consignor, who has made a special contract with the carrier, may always maintain an action upon it for the loss of or damage to the goods, regardless of the question of interest or property in them. Nor would it appear to be material whether the freight upon them has been paid by him or another. If not paid, he is the party to whom the carrier may look for its payment, in

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case the consignee should refuse to accept the goods, or to pay the carrier's charge upon them. And if paid, no matter by whom, the payment would be a sufficient consideration for the contract with the consignor. Section 728.

Ang. Carr., § 299, says that the rule upon this subject is properly stated by PARK, J., in *Freeman v. Birch*, 1 Nev. & M.

420, in which it was held "that the person employ-
Right of con- ing the carrier must bring the action, but that the
signor to bring circumstance of the legal right being in one person
action for de- may be evidence of employment by that person.
lay, continued.

Hence it follows that, in order to decide who is the proper party to be made plaintiff in an action of this sort, the first inquiry must be whether any special agreement for the carriage of the goods in question exists. If there is none, it then becomes necessary to ascertain in whom the right of property is vested. In the former case the remedy for any breach of contract belongs to the party with whom such agreement is made. Therefore, when the consignor agrees with the carrier for the conveyance of the goods, and is to pay him, the action is well brought."

The plaintiffs in this case, according to their evidence, not only made a special contract with the defendant, by which they guaranteed the payment of the freight, but the consignees were not entitled to the possession of the goods until they accepted the drafts attached to the bills of lading. The sales in this case were made by telegram. The Columbus purchasers or consignees, De Witt & Co., wired the plaintiffs for prices, who replied that they would sell them the produce, shipped, at a certain price, "f. o. b. the cars [free on board the cars] at Rural Retreat, shipment subject to draft with bill of lading attached." De Witt & Co. then wired the plaintiffs not to send draft, and they would remit. The plaintiffs answered, refusing to ship unless they would agree to their terms. De Witt & Co. then wired them to ship according to their first proposition. The same kind of a contract, it seems, was made with Bayer & Son, the Charleston purchasers or consignees. It is very clear from their contracts that the plaintiffs did not intend to part with all interest in the goods when they delivered them to the defendant for shipment. The evidence shows that when the consignees refused to receive the goods on the ground that they were damaged, the plaintiffs, upon being notified of the fact, re-

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fused to give directions as to the disposition of the goods, on the ground that they had sold them to the consignees, and the goods were shipped at their risk. This action of the plaintiffs could not change the original contract between them and the consignees. The most that can be said of it is that their conduct at that time is inconsistent with their claim now. It is also equally true that the conduct of the defendant at that time was inconsistent with its present claim. Then it treated the plaintiffs as the owners of the goods, and insisted upon paying, and did pay, then, the balance of the amount received upon the sales of the goods shipped to Charleston, after paying the freight. Now it insists, that the plaintiffs had no interest in the goods shipped after they were delivered to it for shipment. While the conduct of both parties has been inconsistent with their present claims, such conduct cannot affect their legal rights in this case, as neither acted upon the other's conduct to his prejudice.

The evidence shows, or, at least, tends to show, that the consignees had no right to the possession of the goods shipped until they paid the drafts which were attached to the bills of lading. In such a case, Mr. Benjamin says, in section 399 of his work on Sales (2d Am. Ed.), "that where a bill of exchange for the price of goods is inclosed to the buyer for acceptance, together with the bill of lading, the buyer cannot retain the bill of lading unless he accepts the bill of exchange; and if he refuses acceptance, he acquires no right to the bill of lading, or the goods of which it is the symbol."

Mr. Angell says: "Where the direction is not to deliver the goods in case of the existence of certain circumstances, nor until payment should be made by the consignee in cash, the property in the goods continues in the consignor." Section 511.

Hutchinson on Carriers, in discussing this subject, says: "But, after all, the question whether the property in the goods has passed to the consignee by a delivery to the carrier will depend upon the intention of the transaction, and this may always be shown. And goods may be shipped to the order and on account of the consignee as purchaser, and yet his right to the possession of them may be incomplete, as where the direction to the carrier is not to deliver the goods until the payment of the price, or a compliance with some other condition, by the consignee. In such cases, of course,

Right of corporation to
bring action
for delay, continued.

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the title to the goods remains in the consignor until the conditions upon which delivery is to be made have been complied with." Section 734.

There are cases which hold, where goods are sold and shipped C. O. D., the title passes; but in those cases it is admitted that the seller has a special property in the goods sold. In the case of *Pilgreen v. State*, 71 Ala. 368, which was a case where a liquor dealer received an order requesting him to send whisky by express, C. O. D., to the party ordering it, it was said: "The general property, however, passed to the buyer by the delivery to the express company at Calera [the place from which the whisky was shipped]. The risk of loss then passed to him, though there may have remained in the seller a special property, and though the buyer could not, without payment of the price, entitle himself to the absolute property, and to the actual possession. * * * The seller has a lien upon the property for the price, and the right of possession until it is paid."

Whether the contracts in this case vested the title to the goods sold in the consignees, when delivered to the defendant company for shipment, subject to the lien for the purchase price, and the right to the possession until the drafts were accepted, or whether the title did not vest in them until the drafts were accepted, is not material, for, in either case, the plaintiffs had such interest and rights in the property as would entitle them to maintain an action; for it is well settled that where both the consignor and consignee have an interest in the goods, one having a general and the other a special property, either may sue; but a recovery by one constitutes a bar to an action by the other. *Freeman v. Birch*, 1 Nev. & M. 420; *Mayall v. Railroad Co.*, 19 N. H. 122; and 2 Am. & Eng. Encyc. Law, pp. 902, 903. The plaintiffs having such interest in the goods shipped (if any interest be necessary where they have made a special contract with the carrier for their shipment and guaranteed the payment of freight) as gives them the right to maintain an action against the defendant, the question arises, can they maintain an action of tort, or must they bring *assumpsit*?

That they can maintain an action on the case, as well as an action of *assumpsit*, we think, is well settled.

In the case of *Boorman v. Brown*, 3 Adol. & E. (N. S.) 511, 43 E. C. L. 843, 850, Chief Justice TINDAL, in deliver-

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ing the opinion of the court, said: " That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently either *assumpsit* or case upon tort, is not disputed. Such actions are against attorneys, surgeons, and other professional men for want of competent skill or proper care in the service they undertake to render; actions against common carriers, against shipowners on bills of lading, against bailees of different description; and numerous other instances occur in which the action is brought in tort or contract, at the election of the plaintiff." The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform the duty, or the nonfeasance, is a ground of action upon a tort.

Ang. Carr., § 422 says, in discussing this question: " But, in respect to the proper form of action at common law against all common carriers, there was for a long time a question, and one much agitated among pleaders; and it was natural that the question should arise out of the innovation upon the common-law duties of carriers. As long as their occupation was considered as a public duty, the breach was tort, for which they were liable to an action on the case, founded upon the custom of the realm, or, in other words, upon the common law. In time, however, they succeeded in establishing the existence of a contract, and then they at once became liable to an action of *assumpsit* on their undertaking. And a very long established, continued, and uniform usage has sanctioned the principle and adopted the advantages of both forms of action; so that the case may be considered either way,—as arising *ex contractu* or *ex delicto*,—according as the neglect of duty or breach of promise is intended to be relied on as the cause of injury. The practice of declaring against common carriers on the custom of the realm was as ancient as the common the law itself, and was uniformly adopted until the case of *Dale v. Hall*, (decided in 1750) 1 Wils. 281, when the practice of declaring in *assumpsit* succeeded; but, for four hundred years before that time, the declaration was in tort on the custom."

It is said by Hutchinson on Carriers, " that since the recognition (in the case of *Dale v. Hall*) of the right of the bailor of the goods to sue upon his contract with the carrier, the

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two forms of action—the one in *assumpsit* for breach of contract, and the other in tort for the breach of duty—have been adopted indifferently, or at best suited the purposes of the pleader.” Sections 738, 739, 740; 2 Am. & Eng. Enc. Law, p. 903; 3 Rob. Prac. (New) 437–441.

This court, in the case of *Express Co. v. McVeigh*, reported in 20 Grat. 264, 284, held that where there is a public employment, from which rises a common-law duty, an action may be brought in tort, although the breach of duty assigned is the doing or not doing of something contrary to an agreement made, in the course of such employment, by the party upon whom such general duty is imposed. In that case, as in this, there was a special agreement, and this court held that the plaintiff had the right to bring, as he did, an action of tort. In *Ferrill v. Brewis’ Adm’r*, 25 Gratt. 765, 768, Judge STAPLES said: “There is a class of cases, among them that of bailment, in which the foundation of the action springs out of the privity of contract between the parties but in which, nevertheless, the remedy for the breach or nonperformance is indifferently in *assumpsit* or in cases upon tort.”

Form of action continued.

The plaintiffs made the contract with defendant for the shipment of the goods, and guaranteed the payment of the freight. They are, therefore, parties to the contract, and had an interest in the safe delivery of the goods; and it is not for the defendant, who made the contract with them, to say, upon a breach of that contract, that the plaintiff's are not entitled to recover damages which are the direct and natural consequence of such breach of contract. *Blanchard v. Page*, 8 Gray 281, 301.

Even if the defendant had not required the plaintiffs to guarantee the payment of the freight, we do not think its right to recover the same, if it had performed its duty, and the proceeds of the goods shipped were insufficient to pay its freight, could be made to depend upon what may prove to be the legal effect of the dealings between the consignors and consignees upon the title to the property which was the subject of transportation. It had the right to look for its compensation to the plaintiffs, who required it to perform the service by delivering the goods to it for transportation. And the plaintiffs, unless they were the mere agents of the consignees, have the right to enforce the contract made with the defend-

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ant, and to sue for its breach; and their right to do so cannot be made to depend upon the question whether or not the title to the goods shipped passed by their dealings with the consignees. There can be but one recovery against the defendant for its breach of contract, or its failure to perform its duty, whether the action be brought by the plaintiffs, with whom the contract was made, or by the consignees, if they were the owners of the goods. *Finn v. Railroad Corp.*, 112 Mass. 524.

The consignees in this case, if they had the right to do so, have brought no action, and there is not only no suggestion that they have ever made any objection to the plaintiffs' maintaining this action, but they, or members of their firms, are introduced as witnesses by the plaintiffs in proving their case.

We think that an action on the case in tort may be brought against the carrier, by the party who makes the special contract with it, for its breach of the contract, unless there
Conclusion. be in the contract some undertaking by the carrier which it would not be its duty to perform under the common law. In such case damages for breach of such additional undertaking could, perhaps, only be recovered in an action *ex contractu*.

The plaintiffs, we think, had the right to maintain this action against the defendant, if they proved either that they had made a special contract with it for the transportation of the goods, or that they had any interest or property in the goods, either general or special, and that the defendant had committed a breach of its contract, or failed in the performance of its duty; and that the jury should have been so instructed.

It follows from what has been said that the circuit court erred in the instruction complained of; and for such error its judgment must be reversed, and a new trial awarded, to be had in accordance with the views expressed in this opinion.

ABSTRACTS OF RECENT DECISIONS

(1) **Delivery by Carrier of Goods Received for Transportation** [(1) p. 719]—*What Constitutes—Delivery to Driver of Express Wagon.*—Delivery to the driver of a wagon of an express company, employed in collecting goods throughout a city and delivering them at the offices of the company is a delivery to the company. *Wilmington D. Mfg. Co.*, (Del.) 32 Atl. Rep. 250.

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Same—Legal Obligation as to Time of Delivery.—Where a common carrier receives goods for transportation, and the bill of lading is silent as to the time of delivery at the point of destination, the law implies an obligation to deliver them within a reasonable time. *Central Trust Co. v. Savannah & W. R. Co.*, (U. S. Circuit Ct. N. D. Ga.) 69 Fed. Rep. 683.

Same—Service of Notice of Arrival of Goods on Wrong Person—Liability of Company.—Personal service of notice of the arrival of goods on a person other than the consignee, having the same surname, will not determine the liability of the carrier as such, nor bring it within the provision of Civil Code Cal., § 2120, that a common carrier may reduce his liability to that of a warehouseman, as to goods which have arrived at the place of consignment, by giving notice to the consignee of the arrival. *Cavallaro v. Texas & P. R. Co.*, (Cal.) 42 Pac. Rep. 918.

Same—Delivery to Consignee—Presumption as to Payment of Freight Charges.—Where property has been delivered by a common carrier to a consignee, the presumption is that the latter has paid the carrier's charges. *Shea v. Minneapolis & S. Ste. M. R. Co.*, (Minn.) 65 N. W. Rep. 458.

Same—Failure to Deliver According to Contract for Carriage—Delivery to Rightful Owner.—A carrier may defend against an action for failure to transport and deliver according to the contract of carriage by showing a delivery to the rightful owner. *Cleveland, C., C. & St. L. R. Co. v. Moline R. Co.*, (Ill.) 41 N. E. Rep. 480.

The court stated generally the duties and obligations of carriers in this respect as follows: "It may be stated generally that a common carrier of goods for hire is a bailee, and, as such, is an insurer against loss or injury from whatever cause arising, except only inevitable accident and the public enemy. *Railway Co. v. Keith*, 8 Ind. App. 57. The carrier is bound to account for the goods and their safe delivery. It is a familiar rule that in ordinary cases the bailee can no more dispute the bailor's title than a tenant can dispute that of his landlord. But to this general rule there are exceptions. He may always show, and it is a good defense, that he has in good faith or by legal process yielded the possession to the rightful owner, the person having the lawful right to the possession, the holder of a superior or paramount title to that of the bailor. It is a good defense even though the goods were taken by force and against his consent, if the taking was by the lawful owner and the person entitled to the possession. Surrendering to the rightful owner is in legal effect an accounting, and that is what the bailor himself was in law required to do. It would be unjust and against conscience to allow the shipper or bailor, under the circumstances above indicated, to recover for the value of the goods. The bailee or carrier is bound at his peril to deliver the goods to the rightful owner. He is also bound to the shipper or bailor, under the contract, to carry the goods. If he discharges the first, it would be the height of injustice to hold him liable on the last obligation also. The above propositions are sustained by abundant authority. 4 Lawson, Rights, Rem. & Prac. p. 2914; Hutch. Carr. § 404; *King v. Richards*, 6 Whart. 418; *The Idaho*, 93 U. S. 575; *Bliven v. Railroad Co.*, 36 N. Y. 403; *Transportation Co. v. Barber*, 56 N. Y. 544;

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Bates *v.* Stanton, 1 Duer, 79; Stephens *v.* Vaughan, 4 J. J. Marsh. 206; Biddle *v.* Bond, 6 Best & S. 225; Sheridan *v.* New Quay Co., 4 C. B. (N. S.) 92, 93 E. C. L. 618."

Same—Failure to Inform Consignee of Arrival of Goods—*Liability of Company for Loss of Goods in Depot.*—After the arrival of goods at their destination the consignee inquired of the agent of the defendant company on three different occasions within 16 days if the goods had arrived, and was informed that they had not. Finally, when at the depot on other business, he discovered the goods, on Saturday evening, when unprepared to take them and too late for removal, and allowed them to remain, intending to remove them early the following Monday morning. On Sunday, however, by the burning of the warehouse, the goods were destroyed. *Held*, that as the negligent failure to deliver the goods was the proximate cause of the loss, the company was liable to the consignee therefor. Central Trust Co. *v.* East Tennessee, V. & G. R. Co., (U. S. Dist. Ct. E. D. Tenn. N. D.) 70 Fed. Rep. 764. *Following Railway Co. v. Kelly*, 91 Tenn. 699.

The court stated the ground on which the liability rests as stated in the last-named case, as follows: "The fire and the loss may have had different causes. The fire destroyed the goods, but it does not follow that the cause of the fire and the cause of the loss to plaintiff were one and the same, in legal contemplation. They may have been entirely different. The failure to deliver the goods when demanded did not cause the fire, but it did cause the loss, in such sense that they would not have been lost without the failure. Had the defendant delivered the goods, they would have been removed, and the loss averted. The neglect and wrongful detention of the goods, and that alone, exposed them to the fire; and, but for that detention, they would not have been destroyed, though the fire did occur. Thus it becomes obvious that the negligence of the railway company was the proximate cause of the loss. The casual connection between the failure to deliver the goods and the injury to the plaintiff is complete."

Same—Changing Destination of Goods without Notice to Shipper.—On a shipment of vegetables reaching a point where the initial carrier connected with another line forming a link in its system, it was found impossible to forward the shipment over that road because of a strike which prevented transportation for but one day. *Held*, that for the failure to notify the shipper, who could have been communicated with in a few minutes, and to take his advice, the company was liable for the loss sustained, because, acting of its own motion, it turned the goods in another direction over another line belonging to its system, where, in the market, they brought but about one eighth of the price they would have brought in the market for which they were intended. Alabama & V. R. Co., (Miss.) 18 So. Rep. 421.

NOTES

(1) p. 716] **Delivery of Shipments by Carrier—What Constitutes Valid Delivery—Duty of Carrier to Make Delivery.**—It is the duty of a common carrier not only to transport goods delivered to him for that purpose, but he has not performed his entire contract as a common carrier until he has delivered the goods, or offered to deliver them, to the consignee, or has done what is equivalent thereto by giving the consignee, if he can be found, due notice of their arrival, and by furnishing him a reasonable time thereafter to take charge of or to remove the same. *Gatliff v. Bourne*, 4 Bing. N. C. 314, S. C. 11 Cl. & F. 45; *Price v. Powell*, 3 N. Y. 322; *Zinn v. New Jersey St. Co.*, 49 N. Y. 442; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *The Sultana v. Chapman*, 5 Wis. 554; *Sleade v. Payne*, 14 La. Ann. 453; *Graves v. Hartford & N. Y. St. Co.*, 38 Conn. 143; *Chicago & R. I. R. Co. v. Warren*, 16 Ill. 502; *Moses v. Boston & M. R. Co.*, 32 N. H. 523.

The obligation of a common carrier by railway is not only to transport the goods to the place of destination, but also to deposit them without delay, and without additional charge, in its warehouse until the owner or consignee has a reasonable time to remove them. They are not required, as are carriers by wagon, to deliver at the door or place of business of the owner or consignee, nor as carriers by water to give notice of their arrival; their route being confined to the track of their road, renders the first impracticable, without the use of wagons, which is not part of their contract, and the usual certainty of the arrival of trains renders the latter unnecessary, and by the usage of business is not required. *Ayers v. Morris & E. R. Co.*, 29 N. J. L. 393.

The duty of a common carrier is not merely to carry safely the goods intrusted to him, but also to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination. There are no conditions which would release him from this duty, except such as would also release him from the safe carriage of the goods. The undertaking of the carrier to transport goods necessarily includes the duty of delivering them. A railroad company, it is true, is not a carrier of live stock with the same responsibilities which attend it as a carrier of goods. The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and of protecting them from injuring each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods. The most scrupulous care in the performance of his duty will not always secure the carrier from loss. But notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or of

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live stock, is more strictly enforced. *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727, *citing* *Forbes v. Boston & Lowell R. Co.*, 133 Mass. 154, 9 Am. & Eng. R. Cas. 76; *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34.

The liability of a common carrier continues until the proper delivery of the goods intrusted to it for transportation. *De Mott v. Laraway*, 14 Wend. (N. Y.) 225; *Smith v. Mashan & L. R. Co.*, 27 N. H. 86; *American Express Co. v. Baldwin*, 26 Ill. 504; *Graff v. Bloomer*, 9 Pa. St. 114; *Backer v. Flagg*, 26 Me. 181; *Pickett v. Downer*, 4 Vt. 21.

A carrier's duty to deliver to the consignee, and the consignee's duty to receive from the carrier, are reciprocal. *Adams Exp. Co. v. Darnell*, 31 Ind. 20.

Any delivery which discharges the carrier as between him and the consignee, is good as against the consignor. *Price v. Oswego & S. R. Co.*, 58 Barb. (N. Y.) 606.

Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion. *McEntee v. New Jersey St. Co.*, 45 N. Y. 34, *citing* *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586; *Powell v. Myers*, 26 Wend. (N. Y.) 290; *Deveroux v. Barclay, B. & Ald.* 702; *Guillaume v. Hamburg & American Packet Co.*, 42 N. Y. 212; *Duff v. Budd*, 3 Brod. & B. 177.

The real question in matters of delivery of shipments by common carriers is this: For whom, by the bill of lading, are the goods intended? If they have reached such person, the delivery to him is good, and absolves the carrier, even though the delivery was obtained by fraud. *Price v. Oswego R. R. Co.*, 58 Barb. (N. Y.) 599; *McKean v. McIvor, L. R.*, 6 Exch. 36.

And the consignee named in a bill of lading must be regarded by the carrier as the *prima facie* owner of the goods, unless the carrier has notice that the right of the consignee to receive the same is disputed. *Angle v. Mississippi, etc., R. Co.*, 9 Iowa 487; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Gurney v. Behrend*, 3 El. & B. 622; *Miner v. Norwich, etc., R. Co.*, 32 Conn. 91.

Independent of statute it is the duty of a common carrier to make personal delivery of shipments to the consignees in cases where such delivery is practicable. But the common-law rule requiring common carriers by land to make personal delivery to consignees has been so far relaxed, as regards railway companies, from necessity, as in most cases, to substitute in place of personal delivery, a delivery at the warehouse of the company. But this is upon the ground that a railway company has no means of delivery beyond its own lines. *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33.

Where one presents an order from the consignee named in a bill

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of lading, or presents the bill of lading, properly indorsed by the consignee, the carrier is thereby authorized to make delivery to the person presenting such order, or holding the bill of lading so indorsed. *Newhall v. Railroad Co.*, 51 Cal. 345; *Coombs v. Bristol, etc., R. Co.*, 3 H. & N. 1; *Lickbarrow v. Mason*, 2 T. R. 63.

And a carrier is authorized to deliver goods to one to whom it has been customary to make delivery, although the bill of lading is to the order of another of *Ontario Bank v. Steamboat Co.*, 59 N. Y. 510.

In *Sweet v. Barney*, 23 N. Y. 335, it was held that the consignee, or his authorized agent, may receive goods addressed to him in the hands of a carrier, at any place, either before or after their arrival at their place of destination, and such acceptance operates as a discharge of the carrier from his liability to the consignor.

In this case the plaintiffs delivered a package of money addressed to the "People's Bank, 173 Canal street, New York," to the defendants to be forwarded from Dansville, N. Y. The package was delivered at the defendant's office in New York city to an employé of the People's Bank, who was authorized and accustomed to receive money packages for the bank, and from whom it was stolen. This action was brought to recover the amount, and it was held that the delivery was proper and operated to discharge the defendants from their obligation as carriers. This case has, however, been criticised in *Howard v. Old Dominion S. S. Co.*, 83 N. Car. 185.

(2) Same—Misdelivery by Carriers—Liability—When Misdelivery is Excused.—A misdelivery of goods by a carrier is held, equally with an entire failure to deliver them, a conversion on his part for which he is responsible. *Winslow, Ward & Co. v. Vermont & M. R. Co.*, 42 Vt. 700; *Newhall v. Central Pac. R. Co.*, 51 Cal. 345; *Southern Exp. Co. v. Dickson*, 94 U. S. 549; *Forbes v. Boston & L. R.*, 133 Mass. 154, 9 Am. & Eng. R. Cas. 76; *Claffin v. Boston & Lowell R. Co.*, 89 Mass. 341; *Deveroux v. Barclay*, 2 B. & Ald. 704.

A carrier cannot excuse himself for the misdelivery of goods intrusted to him by setting up the fact that he has been imposed upon by the party to whom they were delivered, even though fraud or forgery was resorted to by the party. *Viner v. New York, A. G. & W. S. Co.*, 50 N. Y. 23; *Houston & Texas Cent. R. Co. v. Adams*, 49 Tex. 748; *American Merchants' Union Exp. Co. v. Miller*, 73 Ill. 224; *Winslow, Ward & Co. v. Vermont & M. R. Co.*, 42 Vt. 700; *Price v. Oswego & S. R. Co.*, 50 N. Y. 213.

Where there is more than one person of the same name in the place to which goods are directed, the carrier is not liable for a misdelivery in delivering the goods to one of such persons, although such person, in fact, was not the intended consignee, and this even though the person to whom the goods are delivered is a comparative stranger in town. In such case the fault lies with the consignor for not more specifically marking the goods, making reasonably easy the

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exact identity of the consignee. *Bush v. St. Louis R. C. & N. R. Co.*, 3 Mo. App. 62.

See also, as sustaining the rule that where a misdelivery is occasioned by a misdirection, or incomplete direction, or other negligence on the part of the consignor, the carrier is not responsible. *Southern Exp. Co. v. Kauffman*, 12 Heisk. (Tenn.) 161.

(3) **Same—Failure to Deliver—Consignee's Refusal to Accept Goods—Carrier's Liability and Duty.**—In order to charge the carrier with the non-delivery of goods, some evidence of their non-delivery must be given by the shipper or owner; slight evidence will be sufficient to throw upon the carrier the burden of proving the delivery. *The Falcon*, 3 Blatchf. (U. S.) 64.

The principles of law in respect to the undertaking of carriers to deliver goods intrusted to them for transportation, in a reasonable time, depending upon circumstances, although they apply to implied contracts, will not apply to an express contract to deliver the goods in a prescribed time. In the latter case no temporary obstruction, or even the absolute impossibility of complying with the engagement, will be a defense to an action for failure in performing such contract. *Place v. Union Express Co.*, 2 Hilt. (N. Y.) 19; *Atkinson v. Ritchie*, 10 East 530; *Deming v. Grand Trunk R. Co.*, 48 N. H. 455; *Spence v. Chadwick*, 10 Q. B. 517; *Hadley v. Clark*, 8 T. R. 259; *Parmalee v. Wilks*, 22 Barb. (N. Y.) 539; *Harmony v. Bingham*, 12 N. Y. 99.

If the consignee cannot be found, the carrier may store the goods for the benefit of the owner, and at his cost and risk. *Fenner v. Buffalo & S. L. R. Co.*, 44 N. Y. 505; *Cape v. Cordova*, 1 Rawle (Pa.) 203.

A carrier is not justified, by the inability or refusal of the consignee to receive the goods, in leaving them exposed on the platform or walk of the station, but it is its duty to store them for the owner. *Ostrander v. Brown*, 15 Johns. (N. Y.) 39.

KENTUCKY WAGON MANUFACTURING CO.

v.

OHIO & MISSISSIPPI RAILROAD CO. *et al.*

(*Court of Appeals of Kentucky*, Oct. 17, 1895.)

Carriers of Merchandise [(1) p. 565]—**Detention of Cars—Demurrage** [(1) p. 734].—A railroad company may make a reasonable charge for the detention of cars by a consignee or consignor beyond a reasonable time within which to load and unload them. (*Page* 726.)

Same—Same—Enforcement of Charge Through Combination of Carriers.—A railroad company may impose and enforce a reasonable charge for an unreasonable detention of its cars through a Car-Service Association, or other like combination of carriers, organized for that purpose. (*Page* 726.)

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Detention of Cars—Demurrage—Reasonableness of Charge.—Whether a charge of one dollar per day, or fraction thereof, made for the detention of cars and the use of track, on cars not unloaded, within forty-eight hours after arrival, not including Sundays and legal holidays, and on empty cars not loaded within forty-eight hours after being placed, is a reasonable charge, and whether the time, as stated, fixed for the loading and unloading is a reasonable time, are questions of fact for the jury. (*Page 726.*)

Rule Fixing Rate of Demurrage—Right of Railroads to make same without Consulting Shippers and Consignees.—The fact that shippers and consignees are not consulted in the organization of an association of carriers, to fix and enforce rules for charging demurrage for the detention of cars, will not of itself vitiate such rule. (*Page 727.*)

Same—Effect of Want of Reciprocity in Rules.—The fact that rules fixing demurrage for the detention of cars do not provide for reciprocity of indemnity or counter penalties, making the carrier liable for unreasonable delays, does not invalidate such rules. (*Page 727.*)

Same—Right of Railroads to Make and Enforce Rules by Carrier Combinations.—The organization of a Car-Service Association, to make and enforce penalties upon shippers and consignees for the detention of cars, does not affect the corporate functions or rights of the individual railroad companies organizing such association; such companies do not, by reason of so organizing, surrender their corporate functions by a delegating of the control of their affairs, in that respect, to such association. (*Page 727.*)

Same—Same.—Such a combination is not illegal on the ground that the carriers forming the association agreed to make a uniform rate of charge for detention of cars. (*Page 727.*)

Same—Right of One Company to Collect Demurrage for Cars Belonging to Another Company [(1a) p. 735].—One railroad company may collect a charge for the detention by a shipper or consignee of a car belonging to another railroad company, where, by regulation or universal custom, the company into whose custody the car is delivered is entitled to the earnings of such car as long as it is in its possession. (*Page 728.*)

Right of Carrier against Shipper who Avows Intention to Refuse to pay Established Demurrage Charges.—A railroad company may refuse to deliver a consignment to the side track of a shipper or consignee who avows his purpose not to comply with the rules of such carrier in paying charges for the detention of cars, and equity will not compel a carrier to deliver a consignment or to furnish cars to a person who thus declares himself. (*Page 729.*)

APPEAL from Louisville law and equity court. *Affirmed.*

W. O. Harris and Humphrey & Davie, for appellant.

Edmund F. Trabuc, Pirtle & Trabue, and *Lyttleton Cooke*, for appellees.

HAZELRIGG, J.—The Kentucky Wagon Company is a corporation extensively engaged at South Louisville in the business of manufacturing and selling wagons. Its works are located near the junction of the tracks of the Louisville & Nashville and the Louisville Southern

Facts.

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Railroad Companies, and upon its yards it has its own switches and side-tracks, connecting with each of these roads, and with these roads alone. It receives its materials in carload lots, and sends out much of the finished product in the same way. These railroad companies, the one or the other, have physical connection with every other railroad entering the city of Louisville, and are under contract with the wagon company, for a stipulated consideration, to deliver upon the side-tracks of the latter all loaded cars consigned to that company over their own lines, or over their connecting lines, which cars, when unloaded by the wagon company, the carriers are to remove free of charge

In February, 1890, the two roads named, together with the other railways entering the city of Louisville, conceiving that their patrons who handled these shipments in carload lots were unreasonably detaining the cars of the carriers, using them for storage purposes, and otherwise materially impeding the service, formed what is known in the record as the "Louisville Car-Service Association," and through it at once promulgated certain rules and regulations calculated to remedy the evil, and insure the prompt unloading of the consignments and consequent prompt return of the cars. On the other hand, the shippers, conceding that the abuse complained of had in fact grown up, though not through their fault, and contending that the association of the carriers was illegal and wrongful, and the rules they were attempting to enforce unreasonable and exorbitant, formed a counter-association to resist their enforcement. The wagon company was a member of this organization, and, refusing to conform to the rules of the car-service association, or pay the charges accumulating against it, by reason of its detention of cars for more than 48 hours after delivery, the carriers refused to deliver freight consigned to it over their respective lines. Whereupon, in November, 1890, the wagon company brought this action in equity against some 11 of the railroad companies, to restrain them from refusing to deliver to it on its side-tracks, because of its noncompliance with the car-service rules, certain designated carloads of freight ready for delivery, and from so refusing in the future.

The original order, which issued on the plaintiff's petition, enjoined the defendants from further refusing to deliver to the plaintiff the carloads of freight held by them, respectively,

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but thereafter, in August, 1891, and after much of the proof had been taken, the court so modified the order **Facts con-** as to require the wagon company to return and **tinued.** redeliver to the railway companies the cars delivered by them, within the time prescribed by the car-service rules; and such seems to have been the attitude of the parties upon the rendition of the final judgment herein, in December, 1891, when the chancellor refused to grant the relief asked by the plaintiff, dissolved the injunction, and dismissed the petition without costs.

The question to be determined at the threshold of our investigation of this case is, whether or not the rules and regulations of the associated defendants are reasonable and just, and such as the plaintiff ought to have **Questions in** regulated its business by. Whether, if reasonable, **issue stated.** the carriers might enforce them by a combination or association, and whether, however reasonable the rules may be, and however wrongful may have been the action of the plaintiff in resisting them, the carriers could lawfully refuse to deliver the freight consigned to the owners, are questions to be considered further along, as is the question whether, conceding the refusal of the carriers to deliver the freight to have been wrongful, the plaintiff is in an attitude to ask the chancellor to right the wrong by compelling an unconditional delivery of the cars to it.

The rules of the association are of great length, and need not be recited in detail. A discussion of the grounds upon which the appellant seeks to impeach them will sufficiently indicate their nature and purpose. Those grounds, as carefully grouped by the learned chancellor, are as follows:

(1) That the period of 48 hours, which, computed under the car-service rules, extends to nearly 60 hours, within which it is required to unload said cars after delivery, is too short.

(2) That the demurrage charge of a dollar per day per car for the detention of cars after the expiration of said 48 hours is exorbitant and excessive.

(3) That neither the plaintiff nor any other shipper or consignee was consulted by the defendants in the framing of said rules, and that neither it nor any other shipper or consignee has any voice in the selection and appointment of the manager or committee of the car-service association.

(4) That there is no reciprocity of indemnity and counter-

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penalty in said rules, in favor of plaintiff and other shippers and consignees, against the defendants for not promptly performing their duties as common carriers.

(5) That the defendants, by entering the car-service association, have surrendered their corporate autonomy and functions, and relegated the control and management of their business as common carriers to the arbitrary control of the manager and committee of the car-service association, and have thereby agreed to abolish competition, and that, for this reason, the said rules are illegal.

(6) That, under the car-service rules, a delivering railroad company is authorized to demand demurrage charges on cars that do not belong to it, but to other companies.

That there may be a reasonable charge for the detention of the carrier's cars by the consignee or consignor beyond a reasonable time within which to load and unload them cannot now be doubted, and that such charges may be imposed and enforced through what are known over the country as "Car-service Associations," is equally well settled. A few cases only had arisen in the courts prior to the institution of this action, but several have since been considered, and we know of no exception to the general doctrine that reasonable rules, involving charges for such detention, may be promulgated by such associations, and that such organizations have universally been held to effect beneficial results in car service, alike to the shipper and to the carrier.

Whether a charge of one dollar per day or fraction thereof, made for detention of cars and use of track on cars not unloaded within 48 hours after arrival, not including Sundays and legal holidays, and on empty cars not loaded within 48 hours after being placed, is a reasonable charge, and the time fixed for the loading and unloading, as required in the rule, is a reasonable time, are questions of fact, and on these issues the preponderance of the proof is clearly with the carriers. Such was the finding of the chancellor at the hearing of the motion for a modification of the injunction, and his conclusion at the final hearing; and such was the opinion of the judge of this court as to the reasonableness of the time for redelivery when the case was heard on a motion to reinstate the injunction after its modification. Such, indeed, has been the determination of every tribunal where a similar provision has been adopted by the various car-

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for detention
of cars.**

**Same—Reason-
ableness of
charge.**

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service associations of the country, nor has it been found objectionable to the courts because no exception is made in behalf of the shippers by reason of an unfavorable condition of the weather.

The rule, to be beneficial to all alike, must be of universal application, and a rare or exceptional circumstance, incident to a particular shipper at some particular time, cannot be allowed to annul the rule. The rule must allow time enough to meet all cases likely to arise, and that such is the case here is abundantly shown by the testimony. That the rate of one dollar per day is also reasonable is conclusively shown. It may be somewhat more than the usual per cent on the first cost of a car, but this is not the proper criterion.

A railroad company does not construct cars for the purpose of storing property in them, and their use for transportation involves the use of costly railway tracks, and other expenditures. It may be true, as contended, that the shipper was not consulted in framing these rules. We think, however, if the rules are reasonable, this fact does not vitiate them. No complaint is made that there was an attempt to enforce them before ample notice had been given of their adoption.

Same—Shippers
not consulted
in making
rules.

So, too, if the rules are reasonable, the fact there is no reciprocity of indemnity or counter-penalties provided, cannot avail the appellant. If there is any principle of law well understood by shippers, it is that, for any dereliction of duty, the common carrier may be held accountable.

Same—Reci-
procity of
penalty.

Nor do we think that the roads surrendered their corporate autonomy and functions by relegating the control and management of their affairs to the control of the association. If the rules may be enforced by the respective carriers in their separate capacities, they may be enforced by them jointly. In the executive committee of this voluntary association, each road has its representative, and the rules adopted by the association are accepted by the carriers, and become their own rules. What the carriers may each do for themselves they do by a common agent. This practice is common when union depots are under the control of a common agent of all the roads using the depot. It is true that the rule involves the agreement of the roads to make their charges uniform, and this is supposed by

“Car-service
associations”
not illegal.

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counsel to be in violation of the law preventing agreements among rival carriers not to compete with each other. We do not regard the principle contended for as applicable to this case. Manifestly the object of the rule fixing a uniform charge for the detention of cars is not for the purpose of raising revenue at all. That feature is insignificant, the purpose being to facilitate transportation; and the less revenue there is derived from the enforcement of the charge, the greater the carriers are benefited and their facilities increased for serving the public. The agreement in this case to fix a uniform rate is an advantage, and not an injury, to the appellant and its associates.

It is said, further, that under the car-service rules, the delivering road is authorized to collect storage charges on cars that do not belong to it, but to other companies.

Same—Collection of damage.

This, if true, would seem to be material to the appellant, but it is only true in a qualified sense. The universal practice among carriers is that, instead of the railroad company which first handles the shipment unloading it at its terminal point, thus necessitating a transfer to a connecting line to be forwarded to its destination, the cars containing the freight are delivered to the connecting line, and this line takes charge of and uses and controls the car so received as its own property. It keeps it in repair while so using it, as it does its own cars, and under a mutual and universal custom is entitled to all its earnings. Certainly, no custom or regulation is more beneficial to shippers than this, for otherwise a transfer must be made at each terminal point of the carrier. The assumption is that this interchange of cars will work out equal advantages to all, but, to still further equalize the earnings, an account of the mileage is taken, and the road using the car renders an account to the road in fact owning it on the basis of three quarters of a cent a mile so run.

We are convinced, therefore, that no valid objection can be urged against the enforcement of these rules of the appellees as announced through this association. They not only commend themselves to the reason and common experience of those observant of such matters, but, as we have indicated, they have found approval at the hands of a number of the courts of the country, and, we may add, of a number of state boards of railroad commissioners, whose business has been to

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carefully investigate such questions in behalf of the general business public. See *Miller v. Railroad Co.*, 88 Ga. 563, 50 Am. & Eng. R. Cas. 79; *Miller v. Mansfield*, 112 Mass. 260; *Chicago, M. & St. P. R. Co. v. Pioneer Land Co.*, (1892, Iowa); *Beach, Ry. Law*, § 924; *Railroad v. Cooke*, (Colo., 1892) 50 Am. & Eng. R. Cas. 89, note.

Admitting all this, the question remains, Is the refusal of the appellant and its associates, even acting, as they did, under a combination to resist the enforcement of these reasonable rules, a legal excuse for the carrier's refusal to deliver freight cars on the appellant's side tracks and switches? If, upon any particular shipment, storage charges accumulated before it was unloaded by the consignee, and it was still in the car of the carrier, we see no reason why it might not be retained until the regulation be complied with and the charges paid. The carrier undoubtedly has a lien on the freight while in his control, and cannot be compelled to surrender his security. But, if he delivers the freight without collecting the car-service fee, can it be said that he may refuse to do his duty as a common carrier, and decline to deliver freight subsequently consigned? If a passenger owe a former bill to the railway, can he be turned away when he tenders his ticket for the trip he is then about to take? The car-service fees in this case were due only to two of the carriers, and if the excuse offered were valid, the other appellees were without even that. The appellant owed them nothing. But the plea is wholly insufficient as an excuse for any of the carriers. They occupy the same attitude, and it is wholly immaterial whether they had or had not demands arising out of the failure of the appellant to pay the arrearages for car service. It was the duty of the roads not in connection with the appellant's yards to deliver the freight consigned to it to the roads which were in such connection, and the duty of these roads to receive it and deliver it to the appellant.

Same—Refusal
of shipper to
pay charge—
Equitable
rights of such
shipper.

The right of the carriers to thus decline to switch cars for those who refuse to pay the bills for car service, as defined in the rules of the association, is made the basis of earnest argument by counsel for appellant that such an unreasonable regulation itself affords ample excuse for the appellant's combination to resist the enforcement of the rules. But it is observable that the enforcement of this rule is made to depend

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on the refusal of the consignee to comply with the regulations. The conditions upon which it may be put in force cannot exist, except at the will of the shipper. He must first wrongfully refuse to comply with the rules before any excuse is given the carrier to do the second wrong; and we think the appellant cannot complain of the wrong-doing of the carrier, made possible by his own wrongful refusal to comply with other reasonable regulations of the carriers.

And this brings us to a consideration of the question, Is the appellant in an attitude to ask the aid of a chancellor to compel the carrier to do that which it admits is its duty to do, and which it is willing to do, upon a compliance upon appellant's part with the reasonable rules of the association? Of the two wrong-doers, we have seen that the appellant was the first; and upon ample authority the chancellor may refuse to hear him. Especially so, when the delivery of the specific cars withheld by the carriers was accomplished upon the issual of the mandatory injunction when the petition was filed. The carriers obeyed the order to deliver, so that no injury in that particular can accrue to the appellant by withholding the relief sought.

In *Nash v. Page*, 80 Ky. 539, the complainants, who were tobacco buyers, withdrew from the board of trade because the warehousemen, also members of the board, were charging them too much. They resolved in a body not to buy from the warehousemen until the latter should accede to their demands. In doing this, they acted in violation of the rules of the board. The warehousemen subsequently and illegally refused them admittance to their rooms, and the chancellor was asked to compel such admission. This court said: "We have already adjudged that all have the right, upon payment of reasonable fees and charges, to enter these public warehouses, nor do we determine that such a right does not belong to the appellants; but while this right exists, it does not follow that the chancellor will undertake to grant relief by injunction when the one party is as much in fault as the other." And the judgment below dismissing the petition was affirmed. This cannot result, as feared by counsel, in putting the proper control and regulation of the business relations of these carriers with their patrons beyond the power of the courts, or relegate the grievances of shippers to the mercy of the carrier. Doubtless, the

Same—Precedents examined.

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appellant has paid to these carriers bills of freight to the extent of thousands of dollars, and not a few of them inaccurate. If these inaccuracies and errors were not corrected, and the carrier made to adjust them, it was certainly not because the courts were not open to its complaints. If the rules of the association provide, as they seem to do, an easy remedy for the settlement of conflicting claims among the parties interested, it is to be regarded only as an additional mode of adjusting these inevitable differences to the slower processes of the law. As suggested in the Nash-Page Case, it may be expected that the personal and mutual interests of the parties in securing a prompt and satisfactory car service, so important to all, will certainly lead them to a fair adjustment of their differences without the aid of the chancellor.

Judgment affirmed.

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HUNT & GRAY.

(Court of Appeals of Texas, Oct. 23, 1895.)

Carriers of Merchandise [(1) p. 565]—Demurrage [(1) p. 734]—Sufficiency of Notice of Arrival of Cars to Fix Liability of Shipper for Demurrage.—Where a party makes a consignment to himself at a point on a connecting line, and the consignment is, during transportation, transferred from the cars in which it was originally shipped to cars of the connecting line, on its arrival at its destination, a notice given by the carrier to the consignee of the fact of the arrival of the number of cars containing the shipment, together with the rolling-stock numbers on the cars, is sufficient notice to render the consignee liable for demurrage for a failure to unload the cars within a proper time after their arrival. It is not necessary to inform the consignee in what cars the shipment was originally made, or into what cars it had been transferred during transportation. (Page 734.)

APPEAL from Bexar county district court. *Reversed.*

Upson & Bergstrom, for appellant.

Buckler & Martin, for appellees.

Demurrage

Galveston, H. & S. A. Ry. Co. v. Hunt

NEILL, J.—On the 4th day of April, 1893, the Chicago, Rock Island & Pacific Railway Company received from the appellees, at Almena, Kan., two car-loads of corn to be transported over its and connecting lines to El Paso, Tex. The car numbers were 2369 and 5460 C. R. I. P. The corn, by its bill of lading, was consigned to Hunt & Gray, El Paso, Tex., and in the bill of lading it was stipulated that “all car-load freight shall be subject to a minimum charge, for trackage and rental, of \$1 per car, per each 24 hours, for detention, or fractional part thereof, after the expiration of 48 hours from its arrival at destination.”

Somewhere en route the grain was transferred to cars Nos. 6487 and 7011 of the Missouri, Kansas & Texas Railway, in which it arrived at its destination over the road of appellant several days prior to the 29th of April, 1893. Hunt & Gray were not in El Paso, and had no office there, but resided and did business in San Antonio, Tex., when the cars of corn arrived. The appellant's agents in El Paso, upon the arrival of the freight, made diligent inquiries as to the whereabouts of the consignees, and, failing to find them or an agent there, wired the company's agent at San Antonio of the arrival of the corn, and the numbers of the cars in which it was loaded, and on the 29th of April, 1893, the appellees received notice from appellant's agents in San Antonio that cars Nos. 6847 and 7011 of Missouri, Kansas & Texas Railway were at El Paso, consigned to their order. Upon receipt of this notice they informed the agent from whom it was received that they could not locate the cars, by the numbers designated, as theirs, stating that they must be transfer numbers, or numbers of the cars into which the grain had been transferred en route, and requested the agent to give them the numbers of the cars in which the grain was originally shipped.

According to the testimony of appellant's witnesses, this information was promptly furnished the appellees, but they disclaimed any recollection of having received information of the original car numbers until May 23, 1893, after which date they immediately notified the appellant that the corn was for A. Bunsow & Co., Juarez, Mexico. The appellant charged on one car \$31, and on the other \$30, demurrage, and refused to deliver the corn until such charges were paid, which was done on the 2d day of June, 1893, and the freight, upon the order of appellees, delivered to A. Bunsow & Co. This suit

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was instituted in the justice's court by the appellees to recover from the appellant the charges paid for demurrage. The appellant answered, denying the indebtedness, and pleaded in reconvention an alleged balance of \$10 due for freight. Judgment was rendered in the justice's court in appellees' favor, from which the railroad company appealed to the district court, where a like judgment was rendered.

Upon the trial the court charged the jury:

"(1) If, from the evidence, you find that the defendant railroad company refused to deliver to plaintiffs the two cars of corn at El Paso, Tex., unless said plaintiffs paid to defendant the sum of \$61 as demurrage, claimed by defendant company for failure of said plaintiffs to receive said corn at its said point of destination, and you further find, from the testimony, that the failure of said plaintiffs, or their agents or servants, to receive said two cars of corn was owing to the failure of defendant to give plaintiffs such notice of the arrival of said two cars of corn at El Paso, Tex., as to enable plaintiffs to identify said two cars of corn, you will find for the plaintiffs in such amount as you find, from the testimony, plaintiffs paid defendant as demurrage on said cars. Instructions.

"(2) If, on the other hand, you find from the testimony that defendants did give to plaintiffs, or their authorized agent, such notice of the arrival of said two cars of corn at El Paso, Tex., as would enable them to identify said two cars of corn, then you are instructed to find for defendant."

These paragraphs of the charge are assigned as error, upon the ground that the "undisputed evidence showed that, immediately upon the arrival of the cars of corn at El Paso, Tex., defendant's agent made diligent inquiry to ascertain the whereabouts of the plaintiffs, for the purpose of notifying them of the arrival at the point of destination of said two cars of corn, and that, as soon as the whereabouts of plaintiffs was ascertained, they were notified by the defendant's agent that two cars of corn had arrived at El Paso, Tex., the point of destination, with instructions to notify plaintiffs of the arrival at El Paso, Tex., and that, as a matter of law, defendant only had to notify said plaintiffs of the arrival of said corn."

We make no hesitation in saying that this assignment is well taken. The notice given appellees on the 29th of April of the arrival of the cars of grain consigned to them is undisputed, and shown by appellees' own testimony. By it they

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were positively informed that two cars (bearing certain numbers) of corn, consigned to them, had reached El Paso over appellant's road. This was all the law required. It was not incumbent upon the appellant to give them a history of the transit of the grain, to inform them in what cars it was originally shipped, nor into what cars it had been transferred in transit. It was sufficient for them to know that their freight had reached the destination stipulated in the bill of lading over appellant's road. And, when this was made known to them, it was their duty to receive it from the company within three days after the reception of such notice. Failing in their duty, the company's liability as a common carrier ceased, and its liability as a warehouseman attached, with the corresponding liability upon the appellees to pay reasonable rental for trackage and cars, as stipulated in the contract of shipment. No question is made by appellees as to the reasonableness of the charges for their detention of the cars, nor could there be, for the charges made were agreed upon by the parties in the contract of shipment.

There was evidence introduced by the appellees to show that they had paid all freight due. It might not have been admissible if it had been objected to, but as it was introduced without objection, and tends to support the verdict of the jury, the verdict upon that issue will not be disturbed.

As there was no evidence that would tend to support a verdict for the appellees, and the undisputed evidence shows that they were not entitled to a judgment, *the judgment of the district court is reversed, and the cause remanded, with instructions to the district court to render judgment for appellant, if the evidence as to the notice of the arrival of the cars of grain is the same on another trial.*

 ABSTRACTS OF RECENT DECISIONS

(1) **Liability of Shipper for Charges for Use of Car while Awaiting Sale of Contents** [(1) p. 735].—A shipper who knows that a person to whom he expected to sell a carload of corn could not pay for it, and that he himself was expected to pay for the use of the car while the corn was in it, and who allows the corn there to remain until he sells it to another person, is liable for a charge for the use of the car of which he had notice, while awaiting a sale. *Hunt v. Missouri, K. & T. R. Co.*, (Tex.) 31 S. W. Rep. 523.

NOTES

(1) p. 734]—**Right of Carrier to Charge for Detention of Cars by Shipper—Demurrage.**—The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by sea-going vessels, and even then, it is believed, it exists alone by contract. *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588, 9 Am. & Eng. R. Cas. 113.

After laying down the law as to demurrage as above, the court, in this case, says: All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement, or the custom of the port allows the consignee to receive and remove goods. But the mode of doing business by the two kinds of carriers (railroad and seagoing vessels) is essentially different. Railroad companies have warehouses in which to store freight. Owners of vessels have none. Railroads discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not, and it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers.

Nevertheless, the inconvenience to a railroad company from goods being left in freight cars standing in the public highway during the unreasonable delay of the consignee in removing the goods, constitutes a claim in the nature of demurrage; but a railroad company has no lien on such goods for the payment of such claim. It must deliver the goods and sue upon the contract of carriage for any damages suffered by the failure of the consignee to take the goods in a reasonable time. *Crommelin v. New York & Harlem R. Co.*, 1 App. Dec. (N. Y.) 472.

(1a) But in *Miller v. Mansfield*, 112 Mass. 260, in which case it was shown that a railroad corporation had a regulation and usage by which cars containing certain kinds of goods should be unloaded by the consignee within twenty-four hours after notice to him of arrival, and for delay in unloading after that time the corporation charged \$2 a day for each car which contained such freight and which was owned by another railroad company, it was held that for a delay in unloading, the corporation in its capacity as a warehouseman, as against a consignee who had knowledge of these facts, had a lien upon the goods for storage.

And in *Hawgood v. One Thousand Three Hundred and Ten Tons of Coal*, 21 Fed. Rep. 681, in which case it was held that a ship owner has a lien upon the cargo for demurrage enforceable in the admiralty although the bill of lading contains no demurrage clause; the court, upon the point as to whether the privilege of demurrage can be exercised where it is not expressly stipulated for in the bill of lading, quoted from *The Hyperion Cargo*, 2 Lowell (U. S.) 94, as follows: "The cases at common law do not afford much aid, because it recognizes no general responsibility for the goods to the shipper, but only a right of retainer, which they say cannot be con-

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veniently exercised in support of a demand for unliquidated damages, a point of no consequence in the admiralty. These remarks," said the court, "are applicable to the cases of *Crommelin v. New York & N. H. R. Co.*, and *Chicago & N. W. R. Co. v. Jenkins*, both above cited."

In *Gage v. Morse*, 94 Mass. 410, a maritime case, the court held that if a bill of lading contains no provisions for the payment of demurrage by the consignee, he is not liable therefor, even upon the acceptance of the cargo; certainly not if he assigns the bill of lading before any of the cargo has been delivered.

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